Supreme Court, U.S.
FILED

NO. 10-583 OCT 30 2010

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IN THE
SUPREME COURT OF THE UNITED STATES

FELICIA MALVEAUX,
JOHN AYANBADEJO, - *PETITIONERS,*

vs.

JANET NAPOLITANO,
SECRETARY DEPT. OF HOMELAND SECURITY ET AL.; - *RESPONDENTS.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

Respectfully Submitted,
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PETITION FOR CERTIORARI

QUESTION(S) PRESENTED FOR REVIEW

1. Whether the District Court and/or the Court of Appeals has jurisdiction to reopen the time for appeal to afford relief from Petitioners' Counsel's failure to file a timely petition for review with the Court of Appeals of the District Court's summary order denying Petitioners' Complaint for Declaratory Action.
2. Whether the District Court erred by imposing her own views about a "real marriage", establishing conditions and requirements beyond INS regulations and judicial precedent, and insisting that only petitioner's spouse's testimony in an adjustment hearing is relevant.

ISSUES

I. If a Plaintiffs' Attorney in the Court below affirmatively misadvises the plaintiff and then allegedly withdraws from the Plaintiffs' case without notice to the Plaintiff or filing a formal Notice to Withdraw in accordance with the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure, can the Plaintiff later claim he received ineffective assistance of counsel?

II. If so, can the same Plaintiffs' Attorney without the consent of the Plaintiffs, and with the acquiescence of the District Court remain on the same case in violation of his fiduciary duties to the Plaintiffs, Disciplinary Rules of Professional Conduct, Judicial Precedent, and his oath of office?

III. What are the roles, responsibilities, and duties of United States District Court Judge in a complaint for declaratory, injunctive, and mandamus relief in which the Plaintiff requests for a jury trial?

LIST OF PARTIES IN COURT BELOW

1. Felicia Malveaux Ayanbadejo and John Ayanbadejo, Plaintiffs-Petitioners, *Pro se.*
2. Janet Napolitano, Secretary, Department of Homeland Security, Defendant-Appellees.
3. Sharon A. Hudson, District Director, United States Citizenship and Immigration Services, Defendant-Appellee.
4. United States Citizenship and Immigration Services, Defendant-Appellee.
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2. Wright & Koch, Federal Practice & Procedure 4th ed.

3. Immigration Law and Family.

4. Immigration Law Sourcebook (14th ed) (2010-11)

5. O'Connor's Federal Rules, Civil Trials (2009)

CITATIONS OF OPINION AND ORDERS IN CASE

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reprinted as Appendix A.

The Fifth Circuit's opinion affirms a judgment of the United States District Court for the Southern District of Texas, Houston Division and is reprinted as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 9, 2010 for the first Appeal. On or about July 13, 2010, Petitioner filed a Petition for Rehearing/Reconsideration/Consolidation on the Fifth Circuit's decision entered on June 9, 2010. The Court below on rehearing the consolidated Appeals entered an order (reprinted as Appendix B) denying the Petition for Rehearing on August 30, 2010.

This Petition is filed within 90 days of the said date, so that this Court has jurisdiction to review the judgment of the Fifth Circuit on petition for certiorari, which rests by virtue of Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

> arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes of Limitation: Remedies on Motion to Reopen

Filing deadlines govern a huge swath of civil claims, ranging from discrimination under Title VII of the Civil Rights Act of 1964 to habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See, e.g., Pace v. DiGuglielmo,* 544 U.S. 408, 410 (2005) (AEDPA); *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002) (Title VII). For these claims, plaintiffs must file within a prescribed time window, or risk forfeiting their claims forever. Exceptions have been made when deadlines would collide with the interests of justice. Courts created the doctrine of equitable tolling by recognizing that a plaintiff should be granted "additional time within which to sue (or meet some other deadline) if even diligent efforts on his part would not have enabled him to prepare and file his suit within the statutory period." *Lewis v. City of Chicago,* 528 F.3d 488, 493 (7th Cir. 2008). Statutes of limitations have been equitably tolled for a variety of reasons, including fraud, *See, e.g.,*

Iavorski v. INS, 232 F.3d 124, 234 (2d Cir. 2000) ineffective assistance of counsel, *See, e.g., Cekic v. INS*, 435 F.3d 267, 170 (2d Cir. 2006); *Mahmood v. Gonzales*, 427 F.3d 248, 251-52 & 252 n.8 (3d Cir. 2005) and mental incapacity. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 2242 (9th Cir. 1999).

STATEMENT OF THE CASE

Petitioners requests the Court to Review the Decisions of all the Courts below in this case including the decision denying the Petitioners' application to re-open the time for Appeal of the District Court's summary dismissal of the Petitioners' Complaint for declaratory, injunctive, and mandamus relief in which, Plaintiff-Petitioners, Mr. and Mrs. Ayanbadejo asserted that the respondents'-appellees' wrongful actions deprived Plaintiffs-Petitioners of their rights under judicial precedent, the Freedom of Information Act, the Immigration and Nationality Act, and under the United States Constitution at the administrative proceeding. (AR. 7-22, 107-130; entry number 1 and 24 of the district court's docket sheet). The outcome of this case will affect the duty lower Courts have to litigants before the Court and a Plaintiff counsel has to his clients when advising clients in immigration cases of his intention to withdraw and the rights of his clients to claim ineffective assistance of counsel when not advised or misadvised of procedural and/or substantive law concerning the case.

The decision below holds that due to the Decision in *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) for the premise that the time limitation for filing a notice of appeal is jurisdictional and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) for the premise that the lack of a timely notice mandates

dismissal of the Petitioners' Appeal, the Fifth Circuit has no jurisdiction to hear Petitioners application to Review the District Court's denial of Petitioners' motion to reopen the time for Appeal nor to transfer the Motion to the Court of Appeals for consideration. Respectfully, the Court failed and/or refused to consider Petitioners' argument that Petitioners' failure to file a timely notice of appeal was due to ineffective assistance of Petitioners' counsel.

Summary of Facts

On December 18, 1996, Mr. John Ayanbadejo (John, or Mr. Ayanbadejo, or Petitioner), a citizen of Nigeria, was lawfully admitted to the United States on a nonimmigrant visa, having come on the invitation of his younger sister to join in the celebration of the graduation of Ms. Ayanbadejo from Texas A&M University with a degree in Chemical Engineering and to visit with his other siblings. During the visit he met some of his sister's friends, one of whom was his current spouse, Ms. Felicia Malveaux (Felicia, or Mrs. Ayanbadejo, or Petitioner), a United States citizen.

On February 10, 1997, after a brief courtship, John and Felicia got married in Houston, Texas, and began living as husband and wife. (AR. 4, Dkt. No. 16.) On March 3, 1997, through the couple's attorney, Felicia filed with the United States Citizenship and Immigration Services (USCIS) an immediate relative visa petition and an application to change status, naming John as beneficiary. (AR. 4, Dkt. No. 16.) On March 17, 1997, a work authorization card was issued to John.

Administrative Proceedings

On December 16, 1999, more than two years after Mr. and Mrs. Ayanbadejo's marriage and after an interview to adjust John's status to that of lawful permanent status, the USCIS requested additional documentation from Felicia. Specifically, the USCIS requested proof of cohabitation, immunizations for John, and a letter of employment. All requested documents were provided. (AR. 4, Dkt. No. 16.)

On December 5, 2000, more than three years after Felicia's initial application, the USCIS issued a notice of intent to deny her visa petition on an allegation that she had not established eligibility for the benefit sought, relying on a purported investigation that revealed different addresses for John and Felicia during July 1997 and another time period, which the USCIS failed to specify. John and Felicia responded strongly to said notice with an affidavit dated January 24, 2001 in which the address discrepancies were fully explained and/or rebutted. (AR. 4, Dkt. No. 16.)

On or about April 17, 2001, due to lack of response on the first petition, John and Felicia filed another Form I-130 and were interviewed. (AR. 4, Dkt. No. 16.) On June 26, 2002, more than five years after the couple's marriage and initial application and more than a year after the second, the USCIS issued a second notice of intention to deny the petition, based on an allegation that John and Felicia were living separately and that the documentation submitted was insufficient to establish eligibility for the benefit sought.

Felicia responded by providing additional documentation and an affidavit dated July 17, 2002. In her affidavit she explained that career and

employment choices necessitated the couple's living apart temporarily. (AR. 4, Dkt. No. 16.)

On October 9, 2002, more than five years after John validly married Felicia under Texas law, the USCIS issued its notice of denial, based, again, on the allegation that they were temporarily living apart, notwithstanding the compelling evidence that had been submitted to establish the bona fides of the marriage.

On November 5, 2002, the couple timely filed an appeal of the USCIS's October 9, 2002 decision with the Board of Immigration Appeal (BIA), citing judicial precedent that was binding upon the BIA. (AR. 4, 203-16; Dkt. Nos. 16, 29.)

The USCIS neglected to forward the appeal to the BIA despite numerous requests to do so. (AR. 4, Dkt. No. 16.) On or about April 1, 2005, after a long and frustrating delay of more than two years, the couple sought congressional intervention on advice of counsel, and, on June 16, 2005, the BIA inexplicably rendered an opinion affirming the District Director's October 9, 2002 decision without opinion. That decision was timely appealed to the Fifth Circuit, but dismissed for lack of jurisdiction.

On April 10, 2006, John and Felicia brought a complaint in the District Court, seeking declaratory and mandatory relief. (Dkt. No. 1.) On July 18, 2006, the defendants filed a motion to dismiss for lack of subject-matter jurisdiction. (AR. 3, 40-54; Dkt. No. 11.) On August 21, 2006, Mr. and Mrs. Ayanbadejo filed their memorandum in opposition to defendants' motion to dismiss, attaching an appendix

containing portions of John's administrative records.[1] (AR. 4, Dkt. No. 16.) This Court granted the defendants' motion, and Mr. and Mrs. Ayanbadejo timely appealed that dismissal on October 26, 2006. (AR. 5, 229-30; Dkt. No. 30.)

The Fifth Circuit reversed the Court's dismissal for lack of jurisdiction and remanded the case for further proceedings. *Ayanbadejo v. Chertoff*, 517 F.3d 273, 278 (5th Cir. 2008). The defendants moved for summary judgment.

The District Court Decision on Remand

On or about April 11, 2008, Plaintiff Mr. Ayanbadejo[2] hired Mr. Salvador Colon, after reading

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[1]The same day, the couple also filed an application for leave to file amended pleadings and amended pleadings. (AR. 4, 99-129; Dkt. Nos. 23, 24.) On August 29, 2006, defendants filed a response to the Ayanbadejos' opposition to defendants' motion to dismiss. (AR. 5, 130-35; Dkt. No. 17.) On September 5, 2006, Mr. and Mrs. Ayanbadejo filed a supplemental memorandum in opposition to defendants-appellees' motion to dismiss. (AR. 5, 147-59; Dkt. No. 19.)

On September 8, 2006, as a result of a FOIA action, the defendants finally produced the complete immigration records. On receipt of the records, plaintiffs' counsel noticed that the defendants had failed to transmit the couple's brief to the BIA. (AR. 5, 178-225; Dkt. No. 27.) On September 25, 2006, John obtained an exact copy of the letter that had accompanied the brief and the certificate of return receipt, providing irrefutable evidence of timely receipt of the brief by the defendants. (AR. 5, 178-225; Dkt. No. 27.) On September 28, 2006, the couple filed a motion for new trial based on the failure and/or refusal of defendants to transmit the brief to the BIA. (AR. 5, 178-225; Dkt. No. 27.) On October 3, 2006 the district court denied Mr. and Mrs. Ayanbadejo's motion for new trial. (AR. 5, 226-28; Dkt. No. 29.).

[2] To the best of his knowledge, Mr. Ayanbadejo though still married to Mrs. Felicia Malveaux Ayanbadejo no longer resides with her, however Mr. Ayanbadejo provides her with financial

a synopsis of him on the internet, as additional counsel to represent him and his United States Citizen spouse for further proceedings before the Court of Appeals and on remand to the lower Court. Diligently, Mr. Ayanbadejo had hired multiple attorneys to represent Plaintiffs-Petitioners including the Law Firm of O.J. Lawal, original attorneys for Plaintiffs, and Mr. Ambrose O'Neal.

On or about 09/15/2009, unknown to Plaintiff-Petitioner, Mr. Ayanbadejo, the Court respectfully, imposing her own views about a "real marriage", establishing conditions and requirements beyond INS regulations and judicial precedent, and noting and/or insisting that only petitioner's spouse testimony in adjustment hearing is relevant issued its Memorandum and Order granting the Government's Motion for Summary Judgment, dismissing the case with prejudice. *See* Appendix B.

Plaintiffs-Petitioners, who were entitled to receive notice of the entry of judgment, did not receive notice until Monday, March 29, 2010, more than 21 days after the entry of judgment primarily and proximately due to Mr. Colon's actions, lead counsel for petitioners.

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and moral support to the best of his abilities whenever she requests it. To the best of his knowledge, petitioners have no criminal record and are both Catholics. *See Matter of McKee*, 17 I&N Dec. 332 (BIA 1980) [visa petition could not be denied solely because the parties were no longer living together]; *Hernandez v. Ashcroft*, 345 F.3d 824, 845-49 (9th Cir. 2003) [the nonviability of a marriage cannot alone be the basis to deny adjustment even if immigration characterizes its decision to deny as discretionary]; *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. (1979) [visa petition could not be denied solely because people not living together].

Mr. Colon expressly admits to Mr. Ayanbadejo that he received the Court's 9/15/2009, but did not notify Mr. Ayanbadejo, nor take or pursue an appeal because allegedly he was no longer representing Plaintiffs-Petitioners. Mr. Colon stated Mr. Ayanbadejo fired him and Mr. Ayanbadejo denied firing Mr. Colon.

Mr. Colon could not produce any document expressly stating that Mr. Ayanbadejo had fired him nor did Mr. Colon file a Motion to Withdraw before the Lower Court as attorney-in-charge of Plaintiffs-Petitioners in accordance with the Federal Rules of Civil Procedure, Texas Disciplinary Rules of Professional Conduct or Judicial Precedent. Mr. Ayanbadejo in compliance with the procedural requirements established in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), reported the matter to the Texas Board of Disciplinary Appeals. None of the other attorneys hired by Mr. Ayanbadejo to represent Plaintiffs-Petitioners received Notice of the Court's 9/15/2009 Decision or if they did, they failed to inform Mr. Ayanbadejo of receipt of the Court's Notice. *See* Appendix H. Respectfully, contrary to the finding of the Court Mr. Ayanbadejo was diligent in frequently inquiring from Mr. Ambrose O'Neal regarding the status of Petitioners' case. *See* Appendix I. *See Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155-57 (3d Cir. 2007) [respondent not required to file a bar charge where lawyer confessed error and submitted a detailed affidavit regarding his ineffective assistance].

Petitioners after notice timely sought reopening of the time to Appeal the District Court's decision, motion to recuse, and motion to disqualify. All applications were dismissed by the District Court.

In the course of the proceedings the District Court Judge acquiesced to Mr. Colon remaining on the case ostensibly for the Defendants in violation of his fiduciary duties to Plaintiffs-Petitioners, the Texas Disciplinary Rules of Professional Conduct, and Judicial Precedent. Plaintiffs-Petitioners have a right to representation by competent counsel. INA §§240(b)(4), 292, 8 C.F.R. §§292, 1240.3, 1292. *Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974).

The Court of Appeals Decision

Citing *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) for the premise that the time limitation for filing a notice of appeal is jurisdictional and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) for the premise that the lack of a timely notice mandates dismissal of the Petitioners' Appeal, the Fifth Circuit affirmed the District Court's denial of Petitioners' application to reopen the time for Appeal. Respectfully, the Court failed and/or refused to consider Petitioners' argument that Petitioners' failure to file a timely notice of appeal was due to ineffective assistance of Petitioners' counsel. *See* Appendix A – M.

Existence of Jurisdiction in Courts Below

This action was commenced by Petitioner, John Ayanbadejo and his spouse in the United States District Court for the Southern District of Texas. The District Court has jurisdiction over the matter pursuant to INA §§ 201(b), 204(b), 291; 8 U.S.C.A. §§ 1151(b), 1154(b); 8 U.S.C.A. § 1329; 28 U.S.C. §§ 1331, 1346(a)(2), 1361, 2201- 2202; 5 U.S.C. 701, et seq., 706(1), 555(b), 557; and Rule 57 of the Federal Rule of Civil Procedure. *See Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978).

The final judgment of the District Court was entered on September 15, 2009. Plaintiffs-Petitioners, who were entitled to receive notice of the entry of judgment, did not receive notice until Monday March 29, 2010, more than 21 days after the entry of judgment primarily and proximately due to the ineffectiveness of petitioners' counsel. Petitioners timely sought, after notice, to reopen the time for appeal. Petitioners rely on the dissenting opinion of this Court in *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and other favorable decisions of this Court and lower courts as cited in their Petition for Writ to establish jurisdiction in the United States Court of Appeals for the Fifth Circuit.

ARGUMENT FOR ALLOWANCE OF WRIT

The Petitioners herein refers to and adopt all their previous arguments made in the Courts below and in petitioners'-appellants' brief, which was never transmitted to the Board of Immigration Appeals by Respondents and incorporates them here as if set forth in full. Failure to argue any particular issue argued in Mr. and Mrs. Ayanbadejo's said briefs is not to be construed as a waiver or abandonment of that issue.

1. Whether the District Court and/or the Court of Appeals has jurisdiction to reopen the time for appeal to afford relief from Petitioners' Counsel's failure to file a timely petition for review with the Court of Appeals of the District Court's summary order denying Petitioners' Complaint for Declaratory Action.

With all due respect to this Court and the Courts below, petitioners adopts the argument of dissenting opinion of this Court in *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and incorporates them here as if

set forth in full. Petitioner strongly urges this Court to apply the law as stated in dissent to this case.

As this Court in respectfully dissent stated,

> [**2368] The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and [***107] *sua sponte* consideration in the [*217] courts of appeals mandatory, see *Arbaugh*, *supra*, at 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097.2 As the Court recognizes, *ante*, at 210-211, 168 L. Ed. 2d, at 103-104, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick*, *supra*, at 452, 124 S. Ct. 906, 157 L. Ed. 2d 867 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S., at 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed

"jurisdictional,"'" *id.*, at 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (quoting *Scarborough* v. *Principi*, 541 U.S. 401, 414, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.3

2 The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause." ..... What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit.

Most circuit courts that have addressed the issue have found that the 30-day deadline is not jurisdictional. *See Huerta v. Gonzales,* 443 F.3d 753 (10th Cir. 2006) [holding that 30-day filing period is not jurisdictional but a mandatory, claims-processing rule, citing to *Eberhart,* and therefore where BIA accepted an appeal one day late it did not lose jurisdiction over the case]; *Khan v. DOJ,* 494 F.3d 255, 257-59 (2d Cir. 2007) [where DHL delivered the notice of appeal one day late to the BIA, Bowles did not bar petitioner from providing extraordinary or unique circumstances for the failure to timely appeal].

There is no fixed time limit for making a motion to reopen based on lack of notice. *See Holmberg v. Ambrecht,* 327 U.S. 392, 397 (1946) (*quoting Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 348 (1874). "[W]here a plaintiff has been injured by fraud and 'remains in

ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *See also, Iavorski v. INS*, 232 F.3d 124, 234 (2d Cir. 2000) ineffective assistance of counsel, *See, e.g., Cekic v. INS*, 435 F.3d 267, 170 (2d Cir. 2006). In *Wong v. Bowen*, C.A. 2d, 1988, 854 F.2d 630, 631 (Equitable tolling will be allowed in those cases where the agency acts in a "misleading or clandestine way.").

The Fifth Circuit held that a state county district clerk's office's apparent practice of mishandling prisoner petitions for state post-conviction relief, constituted a state impediment under 28 U.S.C. § 2244(d)(B) which tolled the AEDPA limitations period applicable to the prisoner in this case. *Critchley v. Thaler*, 586 F.3d 318 (5th Cir. 2009).

In *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002), the petitioner filed a habeas corpus petition two years after his deportation order became final. Petitioner alleged, in part, that prior counsel's ineffective assistance of counsel rendered his deportation order unlawful. The district court exercised habeas jurisdiction and the Tenth Circuit, adopting the rationale of the *Chamkov* and *Luya Liu* courts, affirmed the availability of habeas jurisdiction to non-criminal deportees.

In *Luya Liu v. INS*, 293 F.3d 36 (2d Cir. 2002), the petitioner filed a *pro se* habeas petition after the Second Circuit dismissed her petition for review as untimely. Concluding that petitioner's "sole means to obtain review of the BIA's decision consisted of a direct appeal," the district court dismissed the petition for lack of jurisdiction. *Luya Liu*, 293 F.3d at 38. The Second Circuit reversed, stating that "[n]othing in *St. Cyr* suggests that its holding – in

substance, an extended exercise in statutory construction -- applies only to criminal aliens." *Luya Liu*, 293 F.3d at 40. Thus, the court concluded that habeas corpus jurisdiction remained regardless of the petitioner's status or grounds of removability. *Luya Liu*, 293 F.3d at 41.

In addition, in an unpublished decision, the Ninth Circuit noted that ineffective assistance of counsel for failure to file an appeal brief to the BIA and a petition for review might permit habeas review. *Harmeet Singh v. BIA*, 2003 U.S. App. LEXIS 20794 (9th Cir. 2003) (unpublished). Citing *Chamkov* and *Luya Liu*, the court noted that "[i]t remains open to Petitioner to raise this Fifth Amendment claim in a petition for a writ of habeas corpus pursuant to 28 U.S C. § 2241."

Some district courts have been receptive to exercising habeas jurisdiction despite the availability of direct review in the court of appeals. *See, for example, Kaweesa v. Ashcroft*, 345 F. Supp. 2d 79, 2004 U.S. Dist. LEXIS 24503, *41 (D.Mass. 2004) ("the provisions in 8 U.S.C. § 1252 limiting 'judicial review' to direct review in the courts of appeals do not foreclose habeas jurisdiction in the district courts."); *Saba v. INS*, 52 F. Supp. 2d 1117, 1123 (N.D.Cal. 1999) (habeas jurisdiction exists where "no other avenue of judicial review" available to petitioners due to the ineffective assistance rendered by counsel). *See* ABA Model Rules of Prof. Conduct, Rule 1.16 (2004); *See, e.g., Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676, 679 (3d Cir. 1986) (local rules allowed judge to deny withdrawal even though client dismissed counsel. In most districts a lawyer cannot withdraw without securing leave of court. E.g, Local

Rules Ill. (N.D.); Rule 83.177 (2004); Local Rules N.Y. (E.D. & S.D.), Rule 1.4 (2004).

Mr. Colon's actions in failing to notify Petitioner John Ayanbadejo of his withdrawal from the case and failing to file his motion to withdraw in accordance with the Federal Rules of Civil Procedure while still being listed as "attorney-in-charge" of the Petitioners with the acquiescence of the court in the matter can be likened to the cases cited *supra* because as attorney-in-charge of Petitioners, Mr. Colon is subscribed to the same oath of office as government employees and therefore has the same duties and responsibilities.

From the foregoing because the Fifth Circuit Court of Appeals decision conflicts with other circuit courts' decision; the position of the respondents' in *Afanwi v. Mukasey*, 130 S. Ct. 350, 175 L. Ed. 2d 4 (2009); and the decision of this court to remand in *Afanwi*; respectfully the Fifth Circuit's reliance on *Bowles* and *Robbins* as applied to the peculiar facts of this case as distinguished from *Bowles* and *Robbins* is in error and this writ ought to be accepted and considered.

1. If a Plaintiffs' Attorney in the Court below affirmatively misadvises the plaintiff and then allegedly withdraws from the Plaintiffs' case without notice to the Plaintiff or filing a formal Notice to Withdraw in accordance with the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure, can the Plaintiff later claim he received ineffective assistance of counsel?

The majority of circuits have suggested or held that the Due Process Clause creates a Right to Assistance of Counsel that is sufficiently effective in immigration proceedings to prevent immigration proceedings from being fundamentally unfair. *See Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601; (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967; (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005). The Fifth Circuit in *Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974), has held that, Plaintiffs-Petitioners have a right to representation by competent counsel. The Ninth Circuit has said that aliens have "a constitutional right to the assistance of counsel in immigration proceedings." *Alcala v. Holder*, 563 F.3d 1009, 1015 n. 11.

The neglect of legal matters by the lawyers to whom they have been entrusted is one of the most widely condemned failures of our profession. *See* Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?* 1974 U.ILL. L. FORUM 193, 210-13 (1974) (citing reports and statistics from various jurisdictions that show neglect as the most common complaint against attorneys). Numerous cases decided under both current and prior laws have concluded that prejudicial delay such as failure to commence an action, file a motion for new trial or take an appeal – could subject a lawyer to discipline. *See Joyner v. Commission for Lawyer Discipline*, 102 S.W.3d 344, 346-347, 347-48 (Tex.App.-Dallas 2003, no pet.) (lawyer failed to file

suit within limitations period); *Attorney Grievance Comm'n v. Nisbett*, 316 Md. 464, 560 A.2d 18, 19 (1989).

Tex. Rule 1.15(d) imposes certain duties on lawyers with respect to matters in which representation has been terminated. The first of these duties is "giving reasonable notice to the client" of the lawyer's intention to withdraw. *See Eureste v. Comm'n for Lawyer Discipline*, 76 S.W.3d 184, 201 (Tex.App.-Houston [14th Dist.] 2002, no pet.) [Court found the notice provided by the lawyer was unreasonable]. This notice allows the client an opportunity to secure new counsel and to take any other necessary measures to protect its interests. *See, e.g., Moss v. Malone*, 880 S.W.2d 45, 50-51 (Tex.App.-Tyler 1994, writ denied) (trial court erred in granting lawyer's deceptive motion to withdraw and in denying client adequate opportunity to secure new counsel); *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986) (noting that the court must give a party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial); *Robinson v. Risinger*, 548 S.W.2d 762, 766 (Tex.Civ.App. – Tyler 1977, writ ref'd n.r.e) (even when an attorney justifiably withdraws, he should protect the welfare of his client by suggesting employment of other counsel).

The reasonableness of the notice will be a question of fact in each case. Under prior law, notice was held insufficient when it failed to clearly apprise the client that the lawyer intended to withdraw, it failed to apprise the client of pending proceedings affecting the case, it was not furnished to the client, or did not allow sufficient time under the circumstances for the client to protect his interests.

See, e.g., Matter of Feuerstein, 115 N.J. 278, 558 A.2d 828, 832 (1989) (oral notice of withdrawal insufficient); *In re Crane,* 400 Mich. 484, 255 N.W.2d 624, 628 (1977) (printed form letter does not constitute notice); *Cardot v. Luff,* 164 W.Va. 307, 262 S.E. 2d 889, 893 (1980) (notice insufficient where clients in civil case did not receive notice of hearing on formal withdrawal motion); *Louisiana State Bar Ass'n v. Carpenter,* 553 So.2d 855, 857 (La. 1989) (lawyer abandoned client without notice by failing to appear in Court); *Womack v. Warden,* 95 Nev. 806, 603 P.2d 267 (1979) (notice of withdrawing counsel for indigent appellant insufficient when only respondent warden received formal notice). *Cf. Eureste v. Comm'n for Lawyer Discipline,* 76 S.W.3d 184, 201 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (lawyer violated Rule 1.15(d) by not notifying client of impending closure of office and lawyer's resultant withdrawal, when the client was first contacted by an employee of the lawyer just before that closure occurred); *People v. Bruinsma,* 34 Mich.App. 167, 191 N.W.2d 108, 113 (1971). Because cases decided under prior law concluded that inadequate notice may result in continuation of the relationship as a matter of law, it is extremely important to give notice of withdrawal. *See Atilus v. United States,* 406 F.2d 694, 696 (5th Cir. 1969); *Ward v. State,* 740 S.W.2d 794, 789-99 (Tex. Crim.App. 1987). Mr. Colon in Petitioners' case failed and/or refused to notify Petitioners of his intention to withdraw or file his Motion to Withdraw in accordance with the Federal Rule of Civil Procedure.

Finally, even though a lawyer has advised his client of the lawyer's intention or desire to withdraw from the representation, the lawyer continues to owe

basic duties of diligence and loyalty to the client until withdrawal is actually accomplished in accordance with these Rules and any applicable rules of practice or procedure. *See Hines v. Comm'n for Lawyer Discipline,* 28 S.W.3d 697 (Tex.App.-Corpus Christi 2000, no pet.) (lawyer who withdrew from representation without taking appropriate steps to protect former client's remaining trial and appellate rights is subject to discipline); *Vander Voort v. State Bar of Texas,* 802 S.W.2d 332 (Tex.App.- Houston [1st Dist.] 1990, writ denied) (lawyer who withdrew without complying with applicable court rules disciplined). Thus lawyers remain subject to discipline for actively working against their client's interests after seeking to withdraw, or for abandoning a matter before properly withdrawing. *See, e.g., In re McCausland,* 605 N.E.2d 185 (Ind.1993) (lawyer discipline for vindictive refusal to return client's files even when requested to do so by client's new lawyer); *In re Slaughter,* 261 Ga. 433, 405 S.E.2d 481 (1991) (lawyer disciplined for failing to return client's document and refund unearned fees upon being discharged); *Sterling v. Jones,* 255 La. 842, 233 So.2d 537, 539 (1970) (attorney owes a duty to the client after withdrawing not to do any act which would be contrary to the interests of that former client). *Also see, In re McCool,* 165 Wis.2d 500, 477 N.W. 2d 631 (1991) (lawyer disciplined for abandoning convicted client just before sentencing, when he merely told client he was moving but left no way for client to contact him); *In re Roberts,* 524 N.E.2d 1272, 1273 (Ind.1988); *Louisiana State Bar Ass'n v. Carpenter,* 553 So.2d 855, 857 (La. 1989); *Florida Bar v. Timson,* 257 So.2d 44, 45 (Fla.1971); *In re Price,* 244 Ga. 532, 261 S.E.2d 349, 349 (1979). *Cf. Penson v. Ohio,* 488 U.S. 75, 109 S.Ct. 346, 102

L.Ed.2d 300 (1988) (procedural rules governing withdrawal of counsel for protection of client, and if lawyer seeks to withdraw without complying with them, motion should denied, even where no prejudice is shown).

Although an IJ has wide discretion to allow a counsel to withdraw, she must take into consideration the need to protect the client. *Immigration Judge's Benchbook* I:8:I.D.5. A lawyer's professional responsibility upon withdrawal includes the duty to take reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving notice to the client, allowing time for the employment of other counsel, and delivering to the client all papers and property to which the client is entitled. Model Rules of Prof. Conduct R. 1.16(d)." *Gjeci v. Gonzales*, 451 F.3d 416, 421-23 (7th Cir. 2006) [where IJ failed to take steps to protect respondent's interests before permitting withdrawal of counsel and then denied respondent a continuance, due process was violated].

There is a denial of right where there is ineffective assistance of Counsel. *See e.g., Fadiga v. Attorney General USA*, 488 F.3d 142, 155-63 (3d Cir.2007) [a claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment as a violation of due process and court reversed denial of motion to reopen for ineffective assistance holding that it violated due process]. *Also see Mai v. Gonzales*, 473 F.3d 162, 165-67 (5th Cir. 2007) [reversed BIA denial of motion to reopen for ineffective assistance despite BIA's claim that the lawyer made a strategic decision when he admitted two grounds of removal where one required a §212(c) waiver and the second a waiver under §240A because

once §212(c) granted for the first ground §240A was unavailable for the second].

Mr. Ayanbadejo has not at any time granted Mr. Colon any consent to testify adversely to petitioners' interest nor does Mr. Ayanbadejo wish to do so either now, in the future or ever.

From the foregoing it can be deduced that the Petitioners can claim they received ineffective assistance of counsel and because the Fifth Circuit Court of Appeals decision conflicts with the settled position of this Court in *Penson v. Ohio,* 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) and other Fifth Circuit court's decision; the position of the respondents' in *Afanwi v. Mukasey,* 130 S. Ct. 350, 175 L. Ed. 2d 4 (2009); and the decision of this court to remand in *Afanwi*; respectfully the Fifth Circuit's reliance on *Bowles* and *Robbins* as applied to the peculiar facts of this case as distinguished from *Bowles* and *Robbins* is in error and this writ ought to be accepted and considered.

II. If so, can the same Plaintiffs' Attorney without the consent of the Plaintiffs, and with the acquiescence of the District Court remain on the same case in violation of his fiduciary duties to the Plaintiffs, Disciplinary Rules of Professional Conduct, Judicial Precedent, and his oath of office?

Rule 1.01 paragraph (b) addresses the situation where a lawyer's testimony, if offered, would be unfavorable to the client. Its structure precludes its possible use as a tactical litigation device. Since a lawyer would not have to volunteer such adverse testimony, the Rule does not require any action on the lawyer's part until it appears that the lawyer will

be compelled to furnish it. Even then the lawyer need not do anything unless that testimony would be "substantially adverse to the lawyer's client." If the lawyer believes that he will be compelled to furnish substantially adverse testimony, paragraph (b) requires the lawyer to treat the situation in accordance with the general conflict of interest principles set out in Rule 1.06, which provide that a client may consent to the representation after disclosure of potential adverse effects.

The Fifth Circuit has taken the position that under ABA Model Rule 3.7, the counterpart to this Rule, "[i]f a lawyer must testify adversely to a client's interest, the client cannot waive the conflict." *Horaist v. Doctor's Hospital of Opelousas,* 255 F.3d 261, 266 (5th Cir. 2001) (citing *Federal Deposit Insurance Corp. v. United States Fire Ins. Co.,* 50 F.3d 1304, 1314 (5th Cir. 1995)).

As stated above Mr. Ayanbadejo has not at any time granted Mr. Colon any consent to testify adversely to the Plaintiffs' interest nor does Mr. Ayanbadejo wish to do so either now, in the future or ever. Therefore from the foregoing the same Plaintiffs' Attorney without the consent of the Plaintiffs, and even with the acquiescence of the District Court cannot remain on the same case without violating his duties.[3]

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[3] The Texas Supreme Court has revised some of the proposed changes to the Texas Disciplinary Rules of Professional Conduct. Revised Rule 1.00(k) defines "informed consent" as a person's agreement to "proposed conduct" after a lawyer has explained in a manner "a reasonable lawyer would believe sufficient" for the person to understand the material risks of and available alternatives to the conduct. Revised Rule 1.00(o) defines "personally prohibited" to mean a lawyer is prohibited

2. Whether the District Court erred by imposing her own views about a "real marriage", establishing conditions and requirements beyond INS regulations and judicial precedent, and insisting that only petitioner's spouse's testimony in an adjustment hearing is relevant.

III. What are the roles and duties of United States District Court Judge in a complaint for

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from representation based on the lawyer's "direct knowledge or involvement" in a matter or transaction. The prohibition extends to lawyers who did not personally represent a client but nonetheless obtained confidential information about that client. Revised Rule 1.06(b) states: "A lawyer shall, not even with informed consent represent opposing parties in the same matter before a tribunal." Under revised Rule 1.09 the Texas Supreme Court removed the definition of "substantially related" and under revised Rule 1.09(c)(1) the Texas Supreme Court eliminated the word "knowingly". The said revised Rule 1.09(c)(1) provides that unless a former client gives informed consent, a lawyer who personally represented the client in a matter shall not thereafter represent another person in a matter adverse to the former client, "in which such other person questions the validity of the lawyer's services or work product for the former client." The Rule as revised makes it "a strict liability" to enter into a representation that is inconsistent with the interest of a former client without obtaining a waiver from the former client. The revisions are similar to the language in the American Bar Association's Model Rules of Professional Conduct. *See* Texas Lawyer Vol. 26 at 1 and 15. *Also See In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir.1992) (local rules are not sole authority governing motions to disqualify because local rules alone cannot regulate party's right to counsel of its choice). Thus, the trend favors imposition of more rigorous standards for violations of some Rules of Professional Conduct, especially those that may affect the due process rights of individuals under a "strict liability" principle warranting immediate sanctions under the American Bar Association's Model Rules of Professional Conduct.

declaratory, injunctive, and mandamus relief in which the Plaintiff requests for a jury a trial?

The Due Process Clause of the U.S. Constitution entitles a person to an impartial and disinterested tribunal in all cases. *See Caperton v. A.T. Massey Coal Co.*, __U.S.__, 129 S.Ct. 2252, 2267 (2009); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Due Process Clause, however, provides only the outer boundaries of judicial disqualification, and congress and the States can impose more rigorous standards. *Caperton*, __ U.S. at __, 129 S.Ct. at 2267; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

See Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1038 (2000) [Sixth Amend. Right to counsel violated where defendant can show reasonable probability that he would have appealed case]

See Agyeman v. INS, 296 F.3d 871, 884-85 (9th Cir. 2002) [reversed BIA because of "potential" prejudice where IJ insisted that only respondent's wife testimony in an adjustment hearing is relevant]. *Podio v. INS*, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); *Colemenar v. INS*, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing").

Moreover, several errors -- each of which alone might be harmless – can have a combined effect that is prejudicial. *See, e.g., Vargas-Garcia v. INS*, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

See also Miller v. Albright, 118 S.Ct. 1428 (1998) [Standing found in some opinions of the Justices even where transmitting parent did not petition]; *Breyer v. Meisner*, 214 F.3d 416, 423-26 (3d Cir. 2000) [beneficiary of derivative citizenship claim had standing to assert mother's claim of discriminatory transmission of citizenship solely by fathers]; *U.S. v. Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999) *judgment vacated on other grounds* 533 U.S. 913 (2001) [third party standing by beneficiary son where father deceased]. Persons subject to denaturalization having standing to make facial challenge to AG's authority without awaiting procedures.

Beneficiaries of immigrant visa petitions also have standing. *See Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998); *Ghaly v. INS*, 58 F.3d 1425, 1434 n.6 (9th Cir. 1995) [beneficiary had standing to contest revocation of visa petition]; *Lockhart v. Chertoff*, Case No. 1:07CV823 (N.D. Ohio Jan. 7, 2008), 2008 WL 80225 [spouse of deceased husband seeking validity of I-130 although not married for two years had standing]; *Oddo v. Reno*, 17 F.Supp.2d 529, 531 (E.D. Va. 1998) [Same]; *Sanchez-Trujillo v. INS*, 620 F. Supp. 1361 (W.D.N.C. 1985) [beneficiary of 2d preference petition had standing to sue for approval of deceased father's petition]; *Taneja v. Smith*, 795 F.2d 355 (4th Cir. 1986) [beneficiary of 6th preference petition had standing]. Standing exists where there is a threatened injury. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 987-88 (5th Cir. 2000) [policy of seizing green cards and providing temporary documents results in sufficient injury because "green cards play a significant role in the day-to day lives of LPRs"].

Under Federal Rule of Evidence (FRE) 603 Mrs. Malveaux Ayanbadejo's affidavits filed before this Court as part of the Court's record qualify as testimony in the support of Mr. Ayanbadejo's petition and such testimony is self authenticating under FRE 902, which states in pertinent part, as follows:

"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments."

Also see U.S. v. Paulino, 13 F.3d 20, 23 (1st Cir. 1994). "Under the [FREs], authentication can be accomplished without the direct testimony of either a custodian or a percipient witness."

Therefore from the foregoing the Judge's remarks and actions is compelling evidence of this Court's personal prejudice towards the Plaintiffs. *See U.S. v. Holland,* 655 F.2d 44 (5th Cir. 1981) [Judge's remarks at the trial showed a personal prejudice against defendant for successfully appealing his conviction on the basis of the judge's actions during a prior trial of the case].

Petitioner strongly urges this court not to make a distinction between private attorneys and government attorneys or civil and criminal cases because in light of the dissenting opinion in *Bowles supra* all attorneys regardless of whether they are private or government attorneys subscribe to same Oath of Office and stakes are equally as high in civil as in criminal cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: October 29, 2010

Respectfully Submitted,
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John Ayanbadejo

JOHN AYANBADEJO

PRO SE

Supreme Court, U.S.
FILED

NO. 10-583 OCT 30 2010

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

FELICIA MALVEAUX,
JOHN AYANBADEJO, - *PETITIONERS,*

vs.

JANET NAPOLITANO,
SECRETARY DEPT. OF HOMELAND SECURITY ET AL.; - *RESPONDENTS.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

Respectfully Submitted,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-20224

JOHN AYANBADEJO; FELICIA AYANBADEJO,

Plaintiffs – Appellants

v.

JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; EVELYN M. UPCHURCH, Director Texas Service Center; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; SHARON A. HUDSON, United States Citizenship and Immigration Services District Director,

Defendants – Appellees

Appeals from the United States District Court for the
Southern District of Texas
USDC Mo. 4:06-CV-1177

Before HIGGINBOTHAM, DAVIS, and BENAVIDES, Circuit Judges. PER CURIAM:

Rule 4 (a) (1) (B) of the Federal Rules of Appellate Procedure and 28 C.S.C. 2107(b) requires that the notice of appeal by the defendant in n civil case in which the United States is a party be filed within sixty days of entry of the judgment or order from which appeal is taken. In this action for declaratory relief, the district court granted the defendants' motion fm summary judgment and entered final judgment on September 15, 2009 On March 31, 2010, the plaintiffs filed a motion to extend or reopen the time to

file a notice of appeal. The district court noted that it could not extend the time for filing the notice of appeal because the motion was filed more than thirty days after entry of judgment. See FED, R. APP. P. 4(a)(5). It also found that it could not reopen the time to file the notice because the motion was filed more than 180 days alter entry of judgment. See FED. R. APP. P. 4(a)(6). Accordingly, it denied the motion on April 6, 2010.

The district court's ability to extend the time to file a notice of appeal is limited by the provisions of Federal Rule of Appellate Procedure 4. See FED. R. APP. P. 26(b)(1). Because the plaintiffs here did not meet the requirements of Rule 4, the district court acted correctly in denying the motion to extend or reopen the time for filing a notice of appeal. As a result, the notice of appeal was untimely. The time limitation for filing a notice of appeal in a civil case is jurisdiction. *Bowles o. Russell,* 551 U.S. 205, 212-13 (2007). The lack of a timely notice mandates dismissal of the appeal. *Robbins v. Margin,* 750 F.2d 405, 408 (5th Cir. 1985).[1]

IT IS SO ORDERED.

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[1] The plaintiffs filed an amended notice of appeal on April 6, 2010. which was even more out of time than the one filed on April 2, and that appeal must also be dismissed The a notice of appeal from the district court's denial of their motion to extend or reopen the time to file the notice Because the district court had authority to grant the motion any argument that it abused its discretion in denying it is frivolous. Accordingly, that appeal also dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*, Plaintiffs,	§	
	§	CIVIL ACTION NO. H-06-1177
v.	§	
JANET NAPOLITANO, *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

The plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, filed this action for declaratory relief against Janet Napolitano in her official capacity as Secretary of the United States Department of Homeland Security and Acting District Director Ray Adams of the United States Citizenship and Immigration Services ("USCIS").[1] This case was remanded by the Fifth Circuit for further review of an adverse decision by USCIS on an immigrant visa petition to classify Mr. Ayanbadejo as the spouse of a United States citizen. *See Ayanbadejo* v. *Chertoff*, 517 F.3d 273, 277-78 (5th Cir. 2008). The defendants have provided the administrative record under seal and they have filed a motion for summary judgment. (Docs. # 52, # 58). The plaintiffs have filed a response. (Doc. # 62). After considering all of the pleadings, and the applicable law, the Court grants the defendants' motion and dismisses this case for reasons that follow.

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[1] Originally, the plaintiffs filed suit against Michael Chertoff, as Secretary of the Department of Homeland Security, and Sharon Hudson, as District Director of the United States Citizenship and Immigration Services. Chertoff has been replaced by Janet Napolitano and Hudson has been replaced by Ray Adams. Because the plaintiffs sue these defendants in their official capacities, the Court substitutes Napolitano and Adams as the proper parties pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure.

I BACKGROUND

The background and procedural history of this case has been set forth previously in the Court's *Memorandum and Order* dated September 21, 2006 [Doc. # 25] and will not be repeated at length here. It is sufficient to note that the plaintiffs seek declaratory relief from an adverse decision on an immigrant visa petition that was filed by Felicia Malveaux Ayanbadejo ("Felicia" or "Felicia Malveaux") on behalf of her spouse, John Ayanbadejo ("John"). The administrative record compiled in connection with the plaintiffs' visa petition is summarized briefly below. [Doc. # 52].[2]

John is a native and citizen of Nigeria. He arrived in the United States with a temporary, non-immigrant visa on December 18, 1996, to visit siblings in Houston, Texas. During his visit to Houston, John met Felicia Malveaux. At that time, Felicia resided in Beaumont, Texas, where she worked as a restaurant manager. The record reflects that John's temporary visa was set to expire on March 5, 1997. [AR at 154]. Shortly before that time, on February 10, 1997, John and Felicia were married by a justice of the peace in Harris County. [ARat446].

As a United States citizen, Felicia promptly filed a Form I-130 "Petition for Alien Relative" (an "I-130 Petition") on March 3, 1997, to obtain an immigrant visa for John as her spouse or "immediate relative."[3] John and Felicia were interviewed separately by an

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[2] Hereafter, all references to the Administrative Record [Doc. # 52] will be cited as "AR."

[3] *See* 8 U.S.C. § 1154 (a)(l)(A)(i) (providing that "any citizen of the United States claiming that an alien is entitled to ... an immediate relative status ... may file a petition with the

(continued...)

adjudications officer on December 16, 1999. Thereafter, the adjudications officer requested additional proof that the couple had been co-habitating since the marriage. [AR at 362]. Investigation revealed that John and Felicia were living at separate residences in Houston and Beaumont, respectively.

In October of 2000, John moved to New York while Felicia remained in Beaumont. The District Director issued a notice of intent to deny the I-130 Petition on December 5, 2000.[4] [AR at 229]. In that notice, the Director concluded that John and Felicia did not have a bona fide marriage and that John was not eligible for the immediate relative visa because it appeared that he had entered into a "fraudulent marriage" for the purpose of obtaining an immigration benefit. *[Id.]*. Thereafter, on April 17, 2001, Felicia filed a second 1-130 Petition for an immediate-relative visa on John's behalf. John and Felicia had a second interview with an adjudications officer on January 8, 2002. After considering affidavits from John and Felicia, as well as additional documentation, the USCIS issued a notice of intent to deny Felicia's second I-130 Petition. In that notice, which is dated June 26, 2002, the Acting District Director found that there was insufficient proof that the marriage was valid for purposes of establishing eligibility for the immediate relative visa:

> Service records reveal [that] you and your [husband] appeared for an interview on January 08, 2002. At that time you stated that on December 16, 1999 you

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[3] (...continued)
Attorney General for such classification"); 8 U.S.C. § 1151 (b)(2)(A)(i) (defining "immediate relative" to include a United States citizen's spouse).

[4] The Court takes judicial notice that Beaumont is located 88 miles from Houston. *See* RAND MCNALLY, ROAD ATLAS: UNITED STATES, CANADA, & MEXICO 98 (2001 ed.).

appeared for an interview regarding your initial filing. At that interview you were requested to submit additional documentation in order to establish eligibility for the benefit sought. The Service received your documentation and determined that it was insufficient. On December 5, 2000 the Service issued a notice of intent to deny the visa petition. Although you submitted additional documentation in response to that notice, on April 17, 2001, you filed another Form I-130. At your second interview you acknowledged that you have been living in Beaumont, Texas but your spouse [John] has been living in New Jersey since October 2001. He previously resided in New York City from October 2000 until October 2001. During that time, you remained in Beaumont. You have not visited your husband in New York or New Jersey. Your spouse stated that he visits Houston and submitted evidence of flights to and from Houston. No evidence was presented showing who he visited and where he stayed on those visits to Houston. You have previously stated, in writing, that your spouse has a brother and other family members who live in Houston. Additional evidence is not supportive of a viable marriage. For example, the monthly statement from your joint checking account at United Bank showed no activity for the month. The cancelled checks you submitted were written to you and signed by you. The evidence submitted fails to establish eligibility for the benefit sought.

[AR at 146]. Based on these findings, the Acting District Director issued his notice of intent to deny the I-130 Petition because he had "reason to believe" that the union was "fraudulent" and entered into solely "for immigration purposes." [AR at 147].

Felicia filed a response to the June 26, 2002 notice of intent and she reportedly presented additional documentation.[5]

[5] A careful review of the administrative record reflects that much of the documentation presented by John and Felicia duplicated information that had been provided previously. [Doc. # 52]. In that respect, the administrative record contains multiple copies of John's tourist visa, the marriage certificate, Felicia's lease agreement for her apartment in Beaumont, John's employment records, tax returns, bank statements, plane tickets, photographs, and other miscellaneous information. Because the same documents appear repeatedly throughout the record, it appears that the same documents were submitted more than once.

On October 9, 2002, the USCIS found that the evidence presented was insufficient to establish that John and Felicia had a bona fide intent to enter into a valid marital relationship:

> At the time of [the January 8, 2002] interview, you acknowledged that you reside in Beaumont, Texas and that your husband has been living in the New York/New Jersey area since October 2000. You acknowledged that you have never visited your husband in New York, or New Jersey since he moved there almost two years ago. Although your husband has made trips to Houston, you have failed to provide evidence of any contact with your husband during those visits. You stated that your husband's family lives in Houston and that he frequently stayed there (not with you in Beaumont) prior to his move out of state. You provided no evidence of telephonic communication with your spouse, such as long distance telephone bills. Your "letters" to your spouse consisted of one three-sentence note stating that you were forwarding income tax papers to his New York address. That letter was postmarked AFTER the interview. The evidence you have submitted fails to establish eligibility for the benefit sought. You have provided insufficient evidence that a bona fide husband-wife relationship was intended.

[AR at 20 (emphasis in original)]. Therefore, the Acting District Director denied the I-130 Petition based on the finding that the marriage was entered into "for the purposes of circumventing immigration law." [ARat21]. On June 16, 2005, the Board of Immigration Appeals ("BIA") affirmed the decision without a written opinion. [AR at 3].

The plaintiffs now seek a judgment declaring that immigration officials wrongfully denied the I-130 Petition for an immediate relative visa that was filed by Felicia on John's behalf.[6]

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[6] Originally, the plaintiffs also requested declaratory, injunctive, and mandamus relief from an adverse decision on a Form I-485 "Application to Register Permanent Residence or Adjust Status" (an "I-485 Application") that John filed on his own behalf to adjust his status from a non-immigrant visitor to a lawful permanent resident under 8 U.S.C. § 1255(a). This Court dismissed those claims previously for lack of subject matter jurisdiction and the Fifth Circuit affirmed that decision. *See Ayanbadejo v. Chertoff, 511* F.3d 273, 276-77 (5th Cir.

(continued...)

In particular, the plaintiffs argue that immigration officials denied the petition in reliance on information that was "rebutted and shown to be demonstrably false" and "mischaracterized evidence" that was "truthfully given" by Felicia. [Doc. # 1, Complaint, at [4]. The plaintiffs explain that they were "temporarily living apart" because of ordinary "career choices" and that they "still communicated like other couples similarly situated." *[Id],* Therefore, the plaintiffs seek a declaration that the defendants' decision to deny the I-130 Petition was unlawful.

The defendants have filed a motion for summary judgment, arguing that the plaintiffs failed to present the requisite evidence to establish their intent to enter into a bona fide marriage or to show that the administrative decision to deny the I-130 Petition was arbitrary, capricious, or contrary to the law. [Doc. # 58]. The plaintiffs disagree. [Doc. #62]. The parties' contentions are discussed below under the governing standards of review

II. STANDARDS OF REVIEW

A. Summary Judgment

The defendants have filed a motion for summary judgment, arguing that the plaintiffs' claims fail as a matter of law. Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp.* v. *Catrett,* 477 U..S. 317, 322 (1986); *Little v. Liquid Air Corp.,* 37F.3d 1069, 1075 (5th Cir. 1994) (en

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[6] (...continued)
2008).

banc). In deciding a motion for summary judgment, a reviewing court must determine whether the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56 (c); *Celotex Corp.*, 477 U.S. at 322-23.

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co.* v. *Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The moving party, however, need not negate the elements of the non-movant's case. *Boudreaux* v. *Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005). The moving party may meet its burden by pointing out "'the absence of evidence supporting the nonmoving party's case.'" *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (quoting *Skotak* v. *Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992)).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (internal citation omitted). The non-movant must do more than simply show that there is some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "An issue is material if its resolution could affect the outcome of the action. A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2006) (internal citations omitted).

B. Review of Administrative Decisions

A reviewing court may only set aside an administrative decision where the plaintiff establishes that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also City of Dallas, Tex.* v. *Hall*, 562 F.3d 712,717 (5th Cir. 2009) (citing *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 375-76 (1989); *Kleppe* v. *Sierra Club, All* U.S. 390, 412 (1976)). Review under this standard is "narrow and highly deferential, requiring only that the agency 'articulate a rational relationship between the facts found and the choice made.'" *City of Abilene* v. *EPA*, 325 F.3d 657, 664 (5th Cir. 2003) (citations and quotation omitted). Under this deferential standard, the reviewing court may not substitute its own judgment for that of the agency. *Id.*

The agency at issue in this case, the USCIS, enjoys broad discretion in deciding whether to grant or deny visa petitions. *See Louisiana Philharmonic Orchestra* v. *INS*, 44 F. Supp. 2d 800, 802 (W.D. La. 1999) (citation omitted). In considering the evidence in this case, the Court is limited to reviewing the administrative record which went before the Board of Immigration Appeals or BIA. *See Camp* v. *Pitts*, 411 U.S. 138, 142 (1973); 5 U.S.C. § 706(2)(E). To uphold the BIA's decision, the defendants must show that the District Director's factual finding that the plaintiffs' marriage was a sham is supported by "substantial evidence" in the record. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Mikhael* v. *INS*, 115 F.3d 299, 302 (5th Cir. 1997). This "requires only that the BIA's decision be supported by record evidence and be substantially reasonable." *Omagah* v. *Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002) (citing *Mikhael*, 115 F.3d at 302). For the

plaintiffs to prevail, by contrast, they must demonstrate that the evidence they presented to the District Director was so compelling that "no reasonable fact finder" could fail to find that they had a bona fide marriage. *Syed v. Ashcroft*, 389 F.3d248, 251 (1st Cir. 2004) (citations and internal quotations omitted). The administrative record is reviewed below in connection with the law governing immigrant visas for the spouse or immediate relative of a United States citizen.

III. DISCUSSION

As outlined above, the administrative decision at issue concerns the denial of an I-130 Petition to classify John as Felicia's spouse and therefore her immediate relative for the purpose of securing an immigrant visa. According to the statute governing immediate-relative visas, any United States citizen claiming that an alien is entitled to "immediate relative status" under 8 U.S.C. § 1151 (b)(2)(A)(i) may file a petition, *i.e.*, an I-130 petition, with the Attorney General for such classification. 8 U.S.C. § 1154(a). Once an I-130 petition is filed, the Attorney General is directed to investigate and, if appropriate, approve the petition "if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made" qualifies as an "immediate relative" as that term is defined by law. 8 U.S.C. § 1154 (b).

In this case, the reviewing official concluded that John failed to qualify as an immediate relative under 8 U.S.C. § 1151 (b) (2) (A) (i) because the plaintiffs failed to present sufficient proof that their marriage was bona fide. In other words, the official denied the I-

130 Petition based on his conclusion that the plaintiffs' union was a fraudulent or "sham marriage" entered into for purposes of circumventing the immigration laws.

The statute governing immediate relative visas contains an express limitation which provides that, if immigration officials determine that a marriage was not entered into in good faith, but was instead a sham marriage entered into for the purpose of evading immigration laws, then the visa petition must be denied. 8 U.S.C. § 1154(c).[7] In visa petition proceedings, the petitioner bears the "burden of proof to establish eligibility for the benefit sought." *Matter of Brantigan*, 11 I. & N. Dec. 493, 493 (BIA 1966). In particular, where a petitioner seeks an immediate-relative visa for a spouse, the petitioner must prove "by a preponderance of evidence that [the petitioner] and the beneficiary intended to establish a life together at the time of their marriage." *Matter of Pazandeh*, 19 I. & N. Dec. 884, 887 (BIA 1989) (citing *Matter of McKee*, 17 I. & N. Dec. 332 (BIA 1980)); *see also Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975). Where the legitimacy of a marriage is called into question,

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[7] The statute that prohibits an immediate-relative visa where a fraudulent marriage is shown states as follows:

> Notwithstanding the provisions of subsection (b) of this section no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

8 U.S.C. § 1154(c).

the petitioner must present documentary or testimonial evidence to show that it was not entered into for the primary purpose of evading the immigration laws. *See Matter of Phillis,* 15 I. & N. Dec. 385, 386 (BIA 1975). In this context, a petitioner is encouraged to present evidence including, but not limited to, "proof that the beneficiary has been listed as the petitioner's spouse on any insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences." *Id.* at 387; *see also Matter of Laureano,* 19 I. & N. Dec. 1, 1 (BIA 1983) (same). The plaintiffs maintain that they met their burden of proof at the administrative level and that the defendants' decision to deny the I-130 Petition was arbitrary, capricious, and contrary to the law.

Following their interview with an adjudication officer on December 16, 1999, the plaintiffs were asked to provide proof of co-habitation since their February 10,1997 marriage by supplying evidence of the following: (1) receipts in both names for purchases of wedding rings, furniture, cars or appliances; (2) home or business purchases or rental leases in both names; (3) bank, savings accounts, and credit card statements in both names; (4) insurance for business, cars, health, or life in both names; (5) utilities statements in both names, bills in both names, personal mail at the same address (not bulk mailings); and (6) income tax records showing joint filings. [AR at 362]. The administrative record shows that the plaintiffs' submission fell far short of the level of proof that was requested.

Although there is one receipt for a mattress in John's name, with Felicia's name added as an afterthought, the record contains no joint receipts for any other purchases. [AR at 339].

There is no evidence that the plaintiffs purchased or leased a home together at any time. The record shows that, after their marriage on February 10, 1997, Felicia continued to reside in Beaumont, Texas, where she had been employed as a restaurant manager since 1987. [AR at 421, 428]. While Felicia continued to maintain her own apartment in Beaumont, John's Texas Driver License confirms that his official residence was in Houston, where he was reportedly employed as a temporary worker, a data entry clerk, or a "credit coordinator." [AR at 420, 453-54]. Although John claims that he lived with Felicia on the weekends, his name was not added to the lease as a co-tenant or resident when Felicia renewed the lease in 1998. [AR at 402]. There is no evidence showing that John was ever added to Felicia's lease. Likewise, there are no utility statements or other bills in both John and Felicia's names. Thus, there is no documentary proof that the two shared a residence following their marriage.

The record also contains little evidence of commingled financial assets following the marriage. John and Felicia filed separate income tax returns for 1997. [AR at 410-11,451-52]. There are no income tax returns in the record for 1998 or 1999. There are isolated bank statements showing that John and Felicia maintained accounts in both of their names in Houston and in Beaumont but, as immigration officials observed, there is no meaningful activity showing that the accounts were being jointly used. John and Felicia purchased life insurance policies for each other in 1999. [AR at 294-95]. The following year, however,

John moved from Texas to New York, where he passed the bar exam,[8] and obtained employment as a contract attorney for a state agency. [AR at 233,381-82]. John and Felicia filed a joint tax return in 2000. [AR at 290-95]. John listed Felicia as a beneficiary on his New York State retirement account in 2001, showing that she continued to reside in Beaumont while he lived in New York.[9] [AR at 298-99].

In his affidavit, dated January 24, 2001, John explained that he was working in New York, but that he would "occasionally" return to Beaumont to spend time with Felicia "on holidays and vacation days." [AR at 233]. John provided a few airline receipts, which purport to document trips to Houston in 2000 and 2001. [AR at 300-308]. There is no evidence, however, showing that John traveled to Beaumont or that he spent time with Felicia during these trips. Likewise, there is no evidence of written or telephonic correspondence, showing that John and Felicia communicated on a regular basis during the extended time that they lived apart. Based on this record, the District Director found that the

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8 John has a foreign law degree from an undisclosed university. In an affidavit dated July 17, 2002, Felicia explained that John was not eligible to take the Texas Bar Exam until he had practiced law fur five years as an attorney in his home country or for three years as an attorney in the United States. [AR at 24]. Felicia said that John planned to practice in New York for three years before returning to Texas to live with her. *[Id.]*. John was admitted to the New York Bar in 2000. It is unclear whether he has taken the Texas Bar Exam or that he has been admitted to practice law here. It is likewise unclear whether John and Felicia are currently together. The Court notes that John appeared for the scheduling conference that was held on December 12, 2008, but that Felicia did not. Likewise, John is the only plaintiff who submitted a signed statement in support of the response to defendants' motion for summary judgment. [Doc. # 62, Ex. 1].

9 In June of 2001, John obtained employment as a hearing officer with the "New York State Office of Temporary and Disability Assistance, Office of Administrative Hearings." [AR at 205].

plaintiffs provided "insufficient evidence that a bona fide husband-wife relationship was intended" and denied the I-130 Petition, concluding that the marriage was a sham. [AR at 20-21].

In the immigration context, a marriage is considered a sham if the bride and groom did not intend to establish a life together at the time they married. *See Syed v. Ashcroft*, 389 F.3d 248,252 (1 st Cir. 2004) (citing *Bark* v. *INS*, 511 F.2d 1200, 1201 (9th Cir. 1975)). The conduct of the parties after marriage is relevant to their intent at the time of marriage. *Bark*, 511 F.2d at 1202. Such conduct is relevant "only to the extent that it bears upon [the plaintiffs'] subjective state of mind at the time they were married." *Id.* (citing *Lutwak v. United States*, 344 U.S. 604 (1953)). Likewise, evidence of post-marital separation is relevant, but not dispositive of intent. *See Bark*, 511 F.2d at 1202. "Of course, the time and extent of separation, combined with other facts and circumstances, can and have adequately supported the conclusion that a marriage was not bona fide." *Id.*

The record in this case demonstrates that the plaintiffs have maintained separate homes and lives throughout their marriage. The evidence shows that, for much if not most of the marriage, the plaintiffs have resided and worked in different cities and, in fact, different states. The fact that the plaintiffs lived separately for most of their marriage, however, was not the only factor relied upon by the District Director when he denied the visa petition. As the District Director noted, there was little evidence, and none convincing, that the plaintiffs commingled their assets. Likewise, there was scant evidence that the two communicated or visited each other during the extensive time they lived apart. Indeed, much

of the meager proof ultimately presented post-dated the interview with the adjudication officer and appeared contrived. Therefore, the record contains substantial evidence to support the District Director's finding that the plaintiffs failed to establish a bona fide marriage or to show that John was entitled to the benefit sought. The plaintiffs have failed to demonstrate that the evidence compels a contrary conclusion or that the two plaintiffs intended to establish a life together under the governing standard. *See, e.g., Bark,* 511 F.2d at 1201. It follows that the plaintiffs have also failed to meet their burden to show that John is eligible for an immediate relative visa. *See National Hand Tool Corp.* v. *Pasquarell,* 889 F.2d 1472, 1475 (5th Cir. 1989) (stating that the plaintiff bears the burden of proving his eligibility for the requested visa).

Based on this sparse record, the plaintiffs have also failed to show that the agency decision at issue was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706(2) (A). Because the evidence does not compel a conclusion contrary to the District Director's findings, and the agency's decision was neither arbitrary nor capricious, a reversal of the agency's ultimate decision is not warranted

in this case.[10] *See Elias-Zacarias*, 502 U.S. at 481. The defendants' motion for summary judgment will be granted, and the complaint for declaratory relief will be dismissed.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. The defendants' motion for summary judgment [Doc. # 52] is **GRANTED.**

2. This case is **DISMISSED** with prejudice.

The Clerk shall provide a copy of this order to the parties.

SIGNED at Houston, Texas on September 15th, 2009.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District Judge

[10] The complaint contains an allegation that the I-130 Petition was denied in violation of the plaintiffs' right to due process because they were not afforded the opportunity to "present evidence, including live witnesses, to cross-examine, the right to subpoena witnesses and documents, [and] the right to inspect the record of proceedings, etc." [Doc. # 1, at ¶ 5]. These allegations are entirely belied by the record. The plaintiffs were afforded ample opportunity to present evidence in support of both the initial I-130 Petition and the second I-130 Petition filed by Felicia on John's behalf. After considering both petitions and the plaintiffs' evidence, immigration officials determined that the plaintiffs failed to produce sufficient evidence to establish that a bona fide marriage. The plaintiffs fail to establish a due process or other constitutional violation in connection with this decision and the record does not disclose one. Therefore, the Court will not address this allegation further.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*,	§	
Plaintiffs,	§	
	§	
	§	CIVIL ACTION NO.
		H-06-1177
	§	
v.		
JANET NAPOLITANO, *et al.*,	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons set forth in the Court's *Memorandum and Order* of even date, the defendants' motion for summary judgment [Doc. #52] is **GRANTED** and this case is **DISMISSED** with prejudice.

This is a **FINAL JUDGMENT.**

The Clerk shall provide a copy of this order to the parties.

SIGNED at Houston, Texas, on September 15th, 2009.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO
	§	H-06-1177
JANET NAPOLITANO, *et al.*,	§	
	§	
Defendants.	§	

ORDER

The plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, filed this action for declaratory relief from an adverse administrative decision on John Ayanbadejo's immigrant visa petition as the spouse of a United States Citizen. On September 15, 2009, the Court granted the defendants' motion for summary judgment and dismissed this case after finding that the plaintiffs were not entitled to relief. According to Rule 4(a) of the Federal Rules of Appellate Procedure, the plaintiffs' notice of appeal was due no later than October 15, 2009. On March 31, 2010, the plaintiffs filed a motion to reopen the time to appeal. [Doc. *# 66]*. On April 2, 2010, the plaintiffs filed an amended motion to reopen the time for appeal. [Doc. # 67]. On that same date, the plaintiffs filed their notice of appeal. [Doc. # 68]. The defendants have filed a response. [Doc. # 70]. The motion is **denied** for reasons set forth briefly below.

There are two avenues in Rule 4(a) of the Federal Rules of Appellate Procedure "for rescuing [an] appeal through a late-filed notice of appeal." *Resendiz* v. *Dretke*, 452 F.3d 356,

358 (5th Cir. 2006) (citing *Wilkens* v. *Johnson*, 238 F.3d 328, 330 (5th Cir. 2001)). A prospective appellant may file a motion for an extension of time under Rule 4(a)(5) or he may seek to re-open the time to appeal under Rule 4(a)(6). Neither option aids the plaintiffs in this instance.

Rule 4(a)(5) provides that a district court "may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause." Because the plaintiffs did not request an extension of time to appeal within sixty days of entry of judgment, Rule 4(a)(5) is not available.

Under Rule 4(a)(6), a district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all of the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

FED. R. APP. P. 4(a)(6). The defendants argue that the plaintiffs fail to satisfy any of the conditions and that an extension is not justified. The Court agrees for reasons that follow.

The plaintiffs do not meet the first condition, which is set forth in Rule 4(a)(6)(A).

Rule 77(d)(1) of the Federal Rules of Civil Procedure requires the Clerk's Office to serve notice of an order or judgment "immediately" and to record such service on the docket. The docket reflects that the order granting summary judgment in favor of the defendants and the final judgment were provided to the parties on September 15, 2009, and that the parties were notified through their counsel of record. [Docs. #64, #65]. According to the plaintiffs, their former counsel (Salvador Colon), received the final judgment but did not send them a copy because he believed that he had been "fired" from the case. [Doc. #67, Ex. A, at ¶ 15]. Nevertheless, because the notice of the final judgment was provided to the plaintiffs through their counsel of record, the plaintiffs fail to satisfy Rule 4(a)(6)(A). *See Resendiz*, 452 F.3d at 362 (observing that notice to counsel of record is imputed to the party).

Even assuming that the plaintiffs did not receive notice of the final judgment, the plaintiffs do not satisfy the second requirement found in Rule 4(a)(6)(B) because they did not file a motion to re-open within the time allowed. The plaintiffs allege that they received notice of the final judgment on March 29, 2010, and filed their motion to re-open 3 days later on March 31, 2010. However, the Court issued its final judgment on September 15, 2009. The 180-day time period to reopen expired on Monday, March 15, 2010. As set forth above, Rule 4(a)(6)(B) requires that the motion to re-open be filed within 180 days of the judgment or within 14 days after receiving notice, "whichever is *earlier.*" FED. R. APP. P. 4(a)(6)(B) (emphasis added). Because the 180-day time period expired before they received notice, they are not eligible for additional time under Rule 4(a)(6).

The plaintiffs offer no valid explanation for their failure to learn of the dismissal

within the time allowed. Although the plaintiffs assert that their former counsel of record (Salvador Colon) was negligent for failing to give timely notice of the final judgment, Mr. Ayanbadejo reports that he is a licensed attorney who is admitted to the United States District Court for the Southern District of Texas. [Doc. # 67, Ex. A]. Mr. Ayanbadejo was present at the scheduling conference on December 12, 2008, and he knew that the defendants were planning to file a summary judgment motion. [Doc. # 50]. The defendants filed their motion for summary judgment on February 6,2009, and Mr. Ayanbadejo filed a personal declaration in response on February 27, 2009. [Docs. # 58, # 60]. Mr. Ayanbadejo does not explain why he waited more than a year, until March of 2010, to enquire whether there had been a decision on the summary judgment motion.

This Court possesses no equitable power to extend the appellate deadlines. *See Oja* v. *Department of the Army,* 405 F.3d 1349, 1358 (Fed. Cir. 2005) (finding that Rule 4(a) is "not subject to equitable tolling"); *Clark v. Lavallie,* 204 F.3d 1038, 1040 (10th Cir. 2000) ("[Nothing within Rule 4(a)(6) indicates it is permissive or that its limitations may be waived for equitable reasons."); *United States ex rel. McAllan v. City of New York,* 248 F.3d 48, 53 (2d Cir. 2001) ("[T]he district court has no equitable powers to alter appellate timelines[.]"), *cert, denied,* 535 U.S. 929 (2002). Likewise, the federal rules provide no remedy, equitable or otherwise, to extend the appellate deadlines in this case.

Accordingly, it is **ORDERED** that the motion for an extension of time [Doc. # 66] and the amended motion for an extension of time to reopen [Doc. # 67] are **DENIED.**

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on April 6th, 2010.

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-06-1177
JANET NAPOLITANO, *et al.*,	§	
	§	
Defendants.	§	

ORDER

On September 15, 2009, this Court granted the defendants' motion for summary judgment and dismissed the declaratory judgment action filed by the plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, regarding an adverse administrative decision on an immigrant visa petition. According to Rule 4(a) of the Federal Rules of Appellate Procedure, the plaintiffs' notice of appeal was due no later than October 15, 2009. The plaintiffs filed their notice of appeal on April 2, 2010. In an order entered on April 6, 2010, the Court entered an order denying the plaintiffs' motion to reopen the time to appeal. [Doc. # 72]. Later that same day, the plaintiffs filed a new notice of appeal and a motion for an extension of time in which to file an amended notice of appeal. [Docs. # 74, # 76]. The defendants have filed a response, to which the plaintiffs have filed a reply. [Docs. # 80, #81]. The plaintiffs' motion will be denied for reasons set out briefly below.

As explained previously in the Court's order dated April 6, 2010, there are only two avenues in Rule 4(a) of the Federal Rules of Appellate Procedure "for rescuing [an] appeal

through a late-filed notice of appeal." *Resendiz* v. *Dretke*, 452 F.3d 356, 358 (5th Cir. 2006) (citing *Wilkens* v. *Johnson*, 238 F.3d 328, 330 (5th Cir. 2001)). A prospective appellant may file a motion for an extension of time under Rule 4(a)(5) or he may seek to re-open the time to appeal under Rule 4(a)(6). For reasons outlined in the Court's previous order, the plaintiffs have not established that they qualify for an extension under either Rule 4(a)(5) or Rule 4(a)(6). Nor have the plaintiffs shown that the Court's previous order was incorrect.

The plaintiffs fail to show that they are entitled to an extension under any theory. Accordingly, it is **ORDERED** that the plaintiffs' motion for an extension of time to file an amended notice of appeal [Doc. # 76] is **DENIED.**

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on April 21, 2010.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO, *et al.*,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	H-06-1177
JANET NAPOLITANO, *et al.*,	§	
	§	
Defendants.	§	

ORDER

On September 15, 2009, this Court granted the defendants' motion for summary judgment and dismissed the declaratory judgment action filed by the plaintiffs, John Ayanbadejo and Felicia Malveaux Ayanbadejo, regarding an adverse administrative decision on an immigrant visa petition. The plaintiffs have filed a joint motion to recuse the undersigned. [Doc. # 88]. The plaintiffs have filed a separate joint motion to disqualify Mr. Ayanbadejo's retained counsel, Salvador Colon. [Doc. # 89]. The motions are denied for reasons set forth briefly below.

The record reflects that this case is presently on appeal to the Fifth Circuit. Under these circumstances, this Court's jurisdiction is limited to those actions taken in aid of the appeal. *See Rutherford v. Harris County, Tex.*, 197 F.3d 173, 190 (5th Cir. 1999)(explaining that, "[o]nce an appeal is taken, the district court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court, or to correct clerical errors under Rule 60(a)") (quoting *Travelers Ins. Co.* v. *Liljeberg Enters., Inc.*, 38

F.3d 1404, 1407 n.3 (5th Cir. 1994)). Neither motion meets that criteria.

Accordingly, it is **ORDERED** that the plaintiffs' pending motions [Docs. # 88, # 89] are **DENIED** for lack of jurisdiction.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on July 9, 2010.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Nancy F. Atlas
United States District judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO and FELICIA MALVEAUX AYANBADEJO, Plaintiffs,	§ § §	
v.	§	CIVIL ACTION NO.
	§	H-06-1177
MICHAEL CHERTOFF, *et al.*, Defendants.	§ §	

ORDER

On September 21, 2006, this Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The plaintiffs have filed a "Motion for New Trial," which the Court construes as a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. # 27). They have also filed a memorandum of law in support of that motion. (Doc. # 28). The plaintiffs' motion is **denied** for reasons that follow.

A Rule 59(e) motion may be granted if the moving party demonstrates any of the following: (1) the judgment was based upon a manifest error of law or fact; (2) there is newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) there is an intervening change in controlling law. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995). Altering, amending, or reconsidering a judgment under Rule 59(e) is an extraordinary measure, which courts should use sparingly. *See id.; In the Matter of Self,* 172 F. Supp. 2d 813, 815 (W.D. La. 2001). With respect to the extraordinary nature of this remedy, the Fifth Circuit has

found that the Rule 59(e) standard "favors denial of motions to alter or amend a judgment." *Southern Constructors Group, Inc.* v. *Dynalectric Co., 2* F.3d 606, 611 (5th Cir. 1993); *see also Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir. 1990) ("Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory."). As such, "the district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration arising under [Rule *59(e)]." Lavespere v. Niagara Mach. & Tool Works, Inc.,* 910 F.2d 167, 174 (5th Cir. 1990).

The plaintiffs in this case sought judicial review of the denial of an immigrant visa petition for the spouse of a United States Citizen and the subsequent decision to deny an adjustment of immigration status. The plaintiffs contend that they are entitled to relief from the final judgment because this Court erred by finding that they did not have a "'real' marriage." (Doc. #28, *Memorandum* at 10). The Court made no such finding, noting only in the alternative that the plaintiffs failed to establish an abuse of discretion by immigration officials in this instance. (Doc. # 25, *Memorandum and Order,* at 14, n.4). This case was dismissed under Rule 12(b)(l) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), codified as amended at 8 U.S.C. § 1252(a)(2)(B), and not for reasons related to the merits of the plaintiffs' claims. The plaintiffs do not show that any

ruling by the Court was incorrect or that they are otherwise entitled to relief under Rule 59(e).

Accordingly, it is **ORDERED** that the plaintiffs' motion to alter or amend the judgment is (Doc. # 27) is **DENIED.**

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on **October 4, 2006.**

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN AYANBADEJO and FELICIA MALVEAUX AYANBADEJO, Plaintiffs,	§ § §	
v.	§	CIVIL ACTION
	§	NO. H-06-1177
MICHAEL CHERTOFF, *et al.*, Defendants.	§ §	

FINAL JUDGMENT

For the reasons set out in the Court's *Memorandum and Order* of even date, this case is **DISMISSED** for lack of jurisdiction.

This is a **FINAL JUDGMENT**

The Clerk will provide copies of this order to the parties

SIGNED at Houston, Texas on **September 21, 2006**

Nancy F. Atlas
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-20224
No. 10-20409

JOHN AYANBADEJO, FELICIA AYANBADEJO,

Plaintiff-Appellants

v.

JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, EVELYN M. UPCHURCH, Director Texas Service Center, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, SHARON A. HUDSON, United States Citizenship and Immigration Services District Director,

Defendants – Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06-CV-1177

Before HIGGINBOTHAM, DAVIS, and BENAVIDES, Circuit Judges. PER CURIAM:

John and Felicia Ayanbadejo, in appeal No. 10-20224, have moved the court for leave to file out of time a motion for reconsideration of our order of June 9, 2010 dismissing their appeal for lack of jurisdiction. We GRANT the motion to file out of time, but DENY the motion for reconsideration, for the reasons

given in our previous order. Because we do not have jurisdiction, we of course have never commented on the merits of the underlying claims.

After we dismissed on June 9, the Ayanbadejos filed another notice of appeal in the district court in the very same case, docketed by our Clerk as appeal No. 10-20409. The Clerk is to consolidate the two docket numbers for administrative purposes. The Ayanbadejos have explained that the second notice of appeal "is an amendment . . . and was not meant to be a separate appeal." Any putative amendment is of no force - as explained by the footnote of our June 9 order. We DISMISS No. 10-20409 for the same reasons we dismissed No. 10-20224.

REVISED May 8, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 8, 2008
Charles R. Fulbruge III
Clerk

No. 06-20866

JOHN AYANBADEJO; FELICIA AYANBADEJO

Plaintiffs - Appellants

v.

MICHAEL CHERTOFF, SECRETARY, DEPARTMENT OF HOMELAND SECURITY ET AL.

Defendants – Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before WIENER, BARKSDALE, and DENNIS, Circuit Judges.
PER CURIAM:

Plaintiffs-Appellants John Ayanbadejo and Felicia Malveaux Ayanbadejo filed this action against Defendants-Appellees Michael Chertoff, in his official capacity as Secretary of the Department of Homeland Security ("DHS"), and District Director Sharon A. Hudson of the United States Citizenship and Immigration Services ("USCIS"), which is part of DHS, and that agency, seeking declaratory, injunctive, and mandamus relief from adverse immigration decisions by these officials. As the district court incorrectly concluded that it lacked subject matter jurisdiction to review the denial of Felicia's I-130 visa

petition, we reverse the decision of the district court granting the government's motion to dismiss and remand for a new trial.

I. Facts and Proceedings

John, a citizen of Nigeria, met Felicia, a United States citizen residing in Beaumont, Texas, during a visit to the United States on a tourist visa in December 1996. The couple married on February 10, 1997. Less than a month after their marriage, Felicia filed a Form I-130 "Petition for Alien Relative" to have John classified as an "immediate relative."[1] John subsequently filed a Form I-485 "Application to Register Permanent Residence or Adjust Status" to become a lawful permanent resident.[2]

On December 5, 2000, after an investigation by the USCIS raised doubts about the validity of the Ayanbadejos' marriage, the USCIS issued a notice of intent to deny Felicia's 1-130 petition and John's 1-485 application.[3] On April 17, 2001, Felicia filed a second I-130 petition seeking an immediate relative visa for John, and John filed a second I-485 application requesting adjustment of his status. On June 26, 2002, the USCIS issued a notice of intent to deny Felicia's second 1-130 petition on the same ground as its previous notice of intent to deny — that the Ayanbadejos' union was not bona fide but was a sham marriage, entered into solely for immigration purposes. Felicia filed a response to USCIS's notice with additional documentation. Unpersuaded, on October 9, 2002, the

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[1] *See* 8 U.S.C. § 1154(a)(1)(A)(i) (providing that "any citizen of the United States claiming that an alien is entitled to ... an immediate relative status . . . may file a petition with the Attorney General for such classification"); 8 U.S.C. § 1151(b)(2)(A)(i) (defining "immediate relative" to include citizen's spouse).

[2] *See* 8 U.S.C. § 1255(a) (providing that Attorney General may, "in his discretion," adjust alien's status to legal permanent resident).

[3] In its notice, USCIS stated that Felicia acknowledged that she lived in Beaumont, Texas while John lived in New York and New Jersey, and that she had not visited John. John provided evidence that he had flown to Houston, Texas, where some of his relatives live, but provided no evidence that he had visited Felicia. The couple also failed to provide sufficient documentation that they shared financial accounts

USCIS issued a notice of denial of the Felicia's I-130 petition and John's 1-485 application.

When the USCIS denied the Ayanbadejos' I-130 petition and I-485 application based on its finding that their marriage was entered into for the purposes of circumventing immigration laws, the Ayanbadejos filed an appeal with the Board of Immigration Appeals ("BIA") of the United States Department of Justice. On June 16, 2005, the BIA affirmed the USCIS's decision without a written order. John subsequently filed a petition for review of the BIA's decision with us, which we dismissed for lack of jurisdiction.

The Ayanbadejos then filed a complaint in district court. The government filed a motion to dismiss for lack of subject matter jurisdiction,[4] arguing that the REAL ID Act of 2005, codified at 8 U.S.C. § 1252(a)(2)(B), eliminated the district court's right to review the Ayanbadejos' I-130 petition and I-485 application.

The Ayanbadejos filed a motion to amend their complaint, in which they alleged that: (1) their constitutional rights had been violated when they were denied a full and fair hearing before the USCIS and BIA; (2) their rights under the Freedom of Information Act ("FOIA") had been violated when they requested, but did not receive, their immigration records within 30 days of filing a request, as required by FOIA; and (3) their rights under the International Covenant on Civil and Political Rights ("ICCPR") were violated by the errors and omissions of the USCIS and BIA.

The district court held that: (1) the immigration decisions involving the Ayanbadejos did not violate their constitutional rights because the correct standards were employed in determining that the couple failed to provide sufficient evidence that their marriage was bona fide; (2) the USCIS's denials of Felicia's I-130 petition and John's I-485 application were within its discretion

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[1] See FED. R. Civ. P. 12(b)(l).

and therefore not subject to judicial review; (3) the Ayanbadejos' FOIA claim was moot because the records they requested had been produced; and (4) their claim under the ICCPR did not present a cognizable cause of action. For these reasons, the court denied the Ayanbadejos' motion to amend their complaint to present their FOIA and ICCPR claims, and granted the government's motion to dismiss for lack of subject matter jurisdiction. The Ayanbadejos filed a motion for new trial, which the district court denied. The Ayanbadejos then timely filed a notice of appeal.

II. Standard of Review

We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(1).[5] We review the district court's decision to grant or deny a motion to amend for abuse of discretion.[6]

III. Analysis

The Ayanbadejos raise three issues on appeal: (1) whether the district court erred in granting the government's motion to dismiss for lack of subject matter jurisdiction because § 1252(a)(2)(B) precluded its review of the Ayanbadejos' I-130 petition and I-485 application; (2) whether the court erred in denying the Ayanbadejos' motion to amend their complaint to include their FOIA and ICCPR claims; and (3) whether the court erred in denying the Ayanbadejos' motion for a new trial. Issues Two and Three are without merit, but our analysis of Issue One, which presents a matter of first impression, leads us to conclude that the district court did, in fact, have subject matter jurisdiction to review Felicia's I-130 petition, requiring us to reverse the district court's ruling and remand to the district court for a new trial.

A. Subject Matter Jurisdiction

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[5] *Premiere Network Servs., Inc. v. SBC Commc'ns, Inc.*, 440 F.3d 683, 687 (5th Cir. 2006); *Crockett v. R.J. Reynolds Tobacco*, 436 F.3d 529 (5th Cir. 2006).

[6] *Briddle v. Scott*, 63 F.3d 364, 379 (5th Cir. 1995).

The Ayanbadejos contend that the district court incorrectly concluded that § 1252(a)(2)(B) divested it of the jurisdiction to hear their claims. We agree with the Ayanbadejos, at least in part. Our decision in *Zhao v. Gonzales,*[7] which provides a clear and consistent roadmap for interpreting §1252(a)(2)(B), is directly applicable to the instant case, and leads us to conclude that, although the district court did not have jurisdiction to review the determinations made with respect to John's I-485 application, the court did have jurisdiction to review the determinations made with respect to Felicia's I-130 petition.

First, the district court correctly held that, under § 1252(a)(2)(B), it did not have jurisdiction to review the decisions to deny John's I-485 application because these determinations were "in the discretion of immigration officials acting under authority of the Attorney General. Section 1252(a)(2)(B)(ii) provides that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or Secretary of Homeland Security the authority for which is *specified under this subchapter to be in the discretion of the* Attorney General or the Secretary of Homeland Security . . . ."[8] In *Zhao,* we interpreted this language to mean that courts are precluded from reviewing those decisions *"specified in the statute"* to be discretionary.[9] Section 1252(a)(2)(B)(i) explicitly places "any judgment regarding the granting of relief under . . . section 1255," which provides the statutory authority for I-485 applications, in this category of discretionary decisions that no courts have jurisdiction to review. The law makes clear that we and the district court lack jurisdiction over determinations

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[7] 404 F.3d 295 (5th Cir. 2005).

[8] 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

[9] *Zhao,* 404 F.3d at 303 ("One might mistakenly read § 1252(a)(2)(B)(ii) as stripping us of the authority to review any discretionary immigration decision. That reading, however, is incorrect, because § 1252(a)(2)(B)(ii) strips us only of jurisdiction to review discretionary authority that is *specified in the statute.")*

made with respect to an I-485 application for permanent resident status under § 1255.[10] The district court thus correctly held that it lacked jurisdiction to review the denial of John's I-485 application.[11]

Felicia's I-130 petition is a different story. Even though all judgments regarding relief under § 1255, including reviews of I-485 applications, are specifically categorized as discretionary and non-reviewable by § 1252(a)(2)(B)(i), I-130 petitions are authorized by § 1154 (a)(l)(A)(i), not § 1255, and are not mentioned in § 1252(a)(2)(B)(i). We have not explicitly determined whether district courts have jurisdiction to review the denial of I-130 petitions, but in *Zhao* we reasoned that Congress included the phrase "specified under this subchapter" in §1252(a)(2)(B)(ii) for the purpose of precisely identifying which discretionary decisions are beyond judicial review.[12] *Zhao* emphasizes that this language was meant to delineate definitively which types of decisions are discretionary, and thus non-reviewable, by a court.[13] The language of other federal regulations addressing I-130 petitions might lead one to infer that I-130

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[10] *Hadwani v. Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006) ("[W]e join a number of our sister circuits in holding that we lack jurisdiction over petitions for review concerning the discretionary denial of relief under 8 U.S.C. § 1255.").

[11] Under § 1252(a)(2)(D), "constitutional claims or questions of law" related to any claim for relief under § 1252(a)(2)(B) are exempted from the category of non-reviewable decisions left to the discretion of the Attorney General. Although the Ayanbadejos argue that the USCIS's basis for refusing to adjust John's status was a legal conclusion that a non-viable marriage precluded the change-in-status John requested, the USCIS's predicate determination of whether the Ayanbadejos had a bona fide marriage was a question of fact, not law, and therefore does not qualify for the § 1252(a)(2)(D) exception to the § 1252(a)(2)(B) jurisdiction stripping provision.

[12] *Zhao*, 404 F.3d at 303 ("The statutory language is uncharacteristically pellucid on this score; it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is specified *under this subchapter* to be in the discretion of the Attorney General.'").

[13] *Id.*

determinations are discretionary, and thus non-reviewable,[14] but, following *Zhoa*, we decline to abdicate our jurisdiction based on any such extra-statutory authority.[15] Categorizing I-130 petition determinations as discretionary based on authority found in an implementing *regulation* would contradict the plain statutory language of §1252(a)(2)(B)(ii), which specifies that courts are only stripped of authority to review decisions designated as discretionary by the *statute*. Section 1252(a)(2)(B)(i) simply does not include I-130 petition determinations in the discretionary category that expressly includes determinations of I-485 applications. Following our clear precedent in *Zhao*, our inquiry need not go any further. Determinations regarding the validity of marriage for I-130 petition purposes are not discretionary within the meaning of §1252(a)(2)(B), and thus are subject to review by courts.[16] The district court incorrectly concluded that it did not have subject matter jurisdiction to review Felicia's I-130 petition.

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[14] *See* 8 C.F.R. § 204.2(a)(1)(ii) (providing that to deny I-130 petition based on sham marriage, there must be "substantial and probative evidence" of immigrant's attempt or conspiracy to enter into marriage to evade immigration laws — arguably, a discretionary determination). *Cf.* 8 U.S.C. § 1154(b), which authorizes I-130 petitions ("After an investigation of the facts in each case ... the Attorney General *shall*, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b). . . approve the petition . . . .") (emphasis added); 8 U.S.C. § 1154(c) ("[N]o petition *shall* be approved if . . . the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.") (emphasis added). The use of the word "shall" in these sections indicates that the approval or disapproval of the petition may not be discretionary.

[15] *Zhoa*, 404 F.3d 303 ("In ruling on Zhao's motion, however, the BIA exercised no such statutorily delineated discretion; that discretion instead derived from regulations promulgated by the Attorney General.").

[16] *Cf. Yerkovich v. Ashcroft*, 381 F.3d 990, 994 (10th Cir. 2004) (stating that "the jurisdictional bar in § 1252(a)(2)(B)(ii) applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines") (internal quotations omitted); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799-800 (8th Cir. 2004); *Ginters v. Cangemi*, 419 F. Supp.2d 1124, 1130 (district court determined that, pursuant to § 1252(a)(2)(B)(ii), it lacked jurisdiction to review denial of I-130 petition because determination whether petitioner had entered into sham marriage was discretionary decision).

B. FOIA, ICCPR Claims

The district court did not err in denying the Ayanbadejos' motion to amend their complaint to add their FOIA and ICCPR claims. "A party may amend its pleading once as a matter of course" at any time before a responsive pleading is served and, thereafter, only by leave of the court or written consent of the adverse party.[17] Courts are instructed to grant leave to amend freely "when justice so requires."[18] Although the Ayanbadejos argue that the district court erred in dismissing their FOIA claim as moot, the USCIS did produce the Ayanbadejos' immigration record to their counsel pursuant to their FOIA request, making this claim moot. The district court did not abuse its discretion in denying the Ayanbadejos' motion to amend their complaint to add their FOIA claim.[19]

The Ayanbadejos also assert that the acts of the USCIS and BIA are continuous violations of the ICCPR, but the Supreme Court has explicitly held that this treaty does not create obligations enforceable in federal courts.[20] The district court did not abuse its discretion in denying the Ayanbadejos' motion to amend their complaint to add a claim under the ICCPR.[21]

C. New Trial Motion

The Ayanbadejos contend that the district court erred in denying their motion for a new trial.[22] Specifically, they assert that, because the USCIS did

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[17] FED. R. CIV. P. 15(a).

[18] *Id.*

[19] *See Avatar Exploration, Inc. v. Chevron*, 933 F.2d 314, 321 (5th Cir. 1991) (district court may properly deny motion to amend when amendment would be futile, would cause undue delay, or is in bad faith).

[20] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

[21] *See Avatar*, 933 F.2d at 321.

[22] *See* FED. R. CIV. P. 59(e).

not transmit their brief containing new evidence to the BIA, their due process rights were violated. The record does not support this claim. On April 18, 2005, the DHS filed a motion with the BIA to dismiss the appeal because the Ayanbadejos new brief was filed with the wrong administrative case number and the DHS did not have a copy of the brief. This motion was served on the Ayanbadejos' counsel on the same day that it was filed, so the Ayanbadejos should have known there was a problem with their brief at that time. They could have resolved the problem prior to the BIA's affirmance of the decision of the USCIS on June 16, 2005. The record also reflects that the Ayanbadejos' immigration records were made available to them on August 29, 2006, almost a month before the district court granted the motion to dismiss on September 21, 2006. The Ayanbadejos therefore had access to their records prior to the district court's ruling and could have raised this claim prior to the court's dismissal of their complaint.

IV Conclusion

We hold that determinations pertaining to I-130 petitions are not precluded from review by courts pursuant to § 1252(a)(2)(B)(ii). The district court did not err in denying the Ayanbadejos' motion to amend their complaint to include their FOIA and ICCPR claims or in denying the Ayanbadejos' motion for a new trial. Although the district court correctly held that the denials of John's I-485 application by the USCIS and BIA were non-reviewable, the court's holding that it did not have subject mater jurisdiction to review Felicia's I-130 petition conflicts with the plain meaning of §1252(a)(2)(B)(ii) and our decision in *Zhao*. The judgment of the district court is therefore REVERSED to the extent that it dismissed Felicia's I-130 petition for lack of jurisdiction and this case is REMANDED to the district court for further proceedings consistent with this opinion.

?40 (Rev. 8/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT
Southern District of Texas

?hn Ayanbadejo, Felicia Ayanbadejo

SUMMONS IN A CIVIL ACTION

V.

Chertoff, Secretary Department of Homeland
?

CASE NUMBER: H-06-1177

M. Upchurch, Director Texas Service Center,

States Citizenship And Immigration Services

TO: (Name and address of Defendant)
Michael Chertoff, et al.
U.S. Attorney's Office,
910 Travis, Suite 1500
Houston, Texas 77002

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

O.J. Lawal, Esq.
O.J. Lawal & Associates
8700 Commerce Park Drive, Suite 202
Houston, Texas 77036

answer to the complaint which is served on you with this summons, within 20 days after service this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you the relief demanded in the complaint Any answer that you serve on the parties to this action must be filed with the clerk of this Court within a reasonable period of time after service.

Michael N. Milby
Clerk

APR 10, 2006
DATE

DEPUTY CLERK

AO (Rev. 8/01) Summons in a Civil Action

RETURN OF SERVICE	
	DATE
Service of the Summons and complaint was made by me[0]	
NAME OF SERVER *(PRINT)*	TITLE
Check one box below to indicate appropriate method of service	

□ Served personally upon the defendant. Place where served:

□ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

Name of person with whom the summons and complaint were left:

□ Returned unexecuted:

□ Other (specify):

STATEMENT OF SERVICE FEES		
RAVEL ↳	SERVICES	TOTAL
		$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

Date *Signature of Server*

Address of Server

? As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

(Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

PLAINTIFFS

a Ayanbadejo, Folicia Ayanbadejo

County of Residence of First Listed Plaintiff Harris
(EXCEPT IN U.S. PLAINTIFF CASES)

Attorney's (Firm Name, Address, and Telephone Number)
rvel & Associates, 8700 Commerce Park Dr. Ste 272,
n, TX 77036, 713.771.0660

DEFENDANTS

Michael Chertoff, Secretary Dept. of Homeland Security;
Emilio Gonzalez, Director of Texas Service Center;
United States Citizenship and Immigration Services

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) U.S. Attorney's Office
910 Travis, Suite 1800
Houston, Texas 77002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
APR 10 2006
MICHAEL N. MILBY, CLERK OF COURT

H-06-1177

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 Federal Question (U.S. Government Not a Party)
- ☐ 3 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
Insurance	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
Marine Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881		☐ 430 Banks and Banking
Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	PROPERTY RIGHTS	☐ 450 Commerce
Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 820 Copyrights	☐ 460 Deportation
Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 830 Patent	☐ 470 Racketeer Influenced and Corrupt Organizations
Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	☐ 840 Trademark	☐ 480 Consumer Credit
Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	LABOR	☐ 490 Cable/Sat TV
Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability		SOCIAL SECURITY	☐ 810 Selective Service
Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
Franchise			☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty		☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other			☐ 900 Appeal of Fee Determination Under Equal Access to Justice
All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights			☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:
Review of finding of marriage fraud, eligibility for Adjustment of Status and Naturalization.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE DOCKET NUMBER

DATE: 1 9, 2006

SIGNATURE OF ATTORNEY OF RECORD

X

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS DIVISION

JOHN AYANBADEJO	§	
FELICIA AYANBADEJO	§	
Plaintiffs		
	§	CIVIL ACTION NO. H-06-1177
VS.	§	
MICHAEL CHERTOFF, SECRETARY	§	
DEPARTMENT OF	§	
HOMELAND SECURITY	§	
EVELYN M. UPCHURCH, DIRECTOR	§	
TEXAS SERVICE CENTER	§	
UNITED STATES CITIZENSHIP	§	
AND IMMIGRATION	§	
SERVICES	§	
Defendants	§	

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF

This complaint challenges the wrongful actions of United States Citizenship and Immigration Services of the United States Department of Homeland Security ("USCIS") in an adjustment of status application of Plaintiff, Mr. Ayanbadejo, beneficiary of an adjustment of status application filed by his United States Citizen spouse, Felicia Malveaux (Mrs. Ayanbadejo) as provided under the Immigration and Nationality Act ("INA" or "the Act") The abdication of statutory and judicial precedential duties imposed upon the USCIS in *Stokes* v. *U.S.. Immigration and Naturalization Service,* 393 F. Supp. 24 (S.D. NY. 1975) and *Ali* v. *I.N.S.,* 661 F. Supp. 1234 (D. Mass. 1986) deprived the plaintiffs of the safeguards set forth in the *Stokes and Ali* judgment; thus rendering Defendant's decision unconstitutional, thwarts congressional intent and causes serious harm to plaintiffs' basic First Amendment Freedom of Association rights; Fifth Amendment Due Process and Equal Protection rights; and Happiness.

NATURE OF THE ACTION

1. This is an action for (i) injunctive relief (Count I), (ii) declaratory relief pursuant to Federal Rule of Civil Procedure 57,28 U.S.C. §§2201, 2202 and 28 USC §2201 (Count II).

2. Plaintiff seeks to hold agency finding (or lack thereof) and conclusion unlawful, unconstitutional and to set aside agency decision that found Plaintiffs' marriage as a marriage to circumvent immigration laws without the requisite procedural safeguards.

3. The classification sought by Plaintiff, Mrs. Ayanbadejo as petitioner for Mr. Ayanbadejo, the beneficiary, includes an I-130 adjustment of status as spouse and an immediate relative of petitioner Mrs. Ayanbadejo. Statute and judicial precedent mandates that the USCIS act to accord the status and benefits when an applicant has demonstrated eligibility; the decision to grant or to extend the status is not subject to the agency's discretion. INA §§ 201(b), 204(b), 291, 8 U.S.C.A. 1151(b), 1154 (b), 1361. *See Chan* v. *Bell,* 464 F. Supp. 125 (D.D.C. 1978) and Firstland v. INS, 377 F.3d 127 (2nd Cir 2004).

4. The agency's finding and refusal to grant the benefit is the result of misapplication and misinterpretation of the law, regulations, the constitution, and facts. Specifically the agency relied on information that Mr. Ayanbadejo's spouse Mrs. Ayanbadejo had rebutted and shown to be demonstrably false and mischaracterized evidence truthfully given by Mrs. Ayanbadejo that employment and the ordinary course of career choices necessitated Mr. and Mrs. Ayanbadejo temporarily living apart Compelling evidence submitted to defendant, which defendant ignored or gave no weight to, clearly shows that though Mr. and Mrs. Ayanbadejo temporarily lived apart they still communicated like other couples similarly situated.

5. Mr. Ayanbadejo has no criminal record of any kind, was working, paid his taxes regularly, and supported his spouse. The unlawful and unconstitutional actions of the defendants

put a strain on the marriage of the plaintiffs contrary to congressional intents and the pronouncements of this administration regarding the importance of marriage and especially the emphasis of marriage between a man and a woman similar to that between the plaintiffs. Defendant's conduct deprived the plaintiffs of many due process safeguards including, *inter alia:* the right to present evidence, including live witnesses, to cross-examine, the right to subpoena witnesses and documents, the right to inspect the record of proceedings etc.

6. Plaintiff asks this court to declare unlawful and unconstitutional the defendants' refusal to grant Mr. Ayanbadejo beneficiary of an adjustment of status filed on his behalf by his United States citizen spouse Felicia Malveaux as required by law as being contrary to the statute.

THE PARTIES

7. Plaintiff John Ayanbadejo ("Mr. Ayanbadejo") is a 40-year-old male citizen of Nigeria. Mr. Ayanbadejo is a lawful resident, who has resided in the United States as a lawful resident since December 1996.

8. Plaintiff Felicia Malveaux is a 39-year-old female United States citizen and is married to Mr. Ayanbadejo.

9. Defendant Michael Chertoff is the Secretary of the United States Department of Homeland Security. Pursuant to 8 U.S.C. 1103(a), he is charged with overall responsibility for administration of the Act, including adjudications of rights and benefits extended by statute. He is sued in his official capacity.

10. Defendant Evelyn M. Upchurch, is District Director of the Texas Service Center of the United States Citizenship and Immigration Services ("USCIS"). Under authority delegated to her pursuant to 8 U.S.C. 1103, she is charged supervisory authority over all operations of the USCIS within her District She is sued in her official capacity.

11. Defendant, the United States Citizenship and Immigration Services ("USCIS"), is an agency of the Federal Government within the Department of Homeland Security. The USCIS is the agency charged with implementing the Act, 8 U.S.C. 1101, et Seq. Pursuant to this authority, the USCIS adjudicates petitions for immigrant and nonimmigrant status and applications for other protections and benefits provided under the Act.

JURISDICTION

12. This Court has jurisdiction over the subject matter of this case pursuant to INA §§201(b), 204(b), 291; 8 U.S.C.A. 1151(b), 1154 (b); 8 U.S.C.A. § 1329; 28 USC §§1331, 1346(a)(2), 1361, 2201-2202; 5 U.S.C. 701, et seq., 706(1), 555(b), 557, and Rule 57 of the Federal Rules of Civil Procedure. *See Chan* v. *Bell,* 464 F. Supp. 125 (D.D.C. 1978) and *Nakamoto* v. *Ashcroft,* 363 F.3d 874 (9th Cir. 2004).

VENUE

13. Venue is proper in this district pursuant to 28 USC § 1391(b), (e) in that this is an action against officers and agencies of the United States in their official capacities, brought in the District where a Defendant resides, where the Plaintiff resides, and where a substantial part of the events or omissions giving rise to Plaintiffs claim occurred More specifically, Plaintiff Felicia Malveaux's application for an adjustment of status filed on behalf of her spouse Mr. Ayanbadejo was properly filed with and was ultimately denied by the Houston USCIS District Director,

EXHAUSTION OF REMEDIES

14. Plaintiff has exhausted all of their administrative remedies. Mr. and Mrs. Ayanbadejo through their attorney have administratively appealed the denial of Mr. Ayanbadejo's adjustment of status application to the Board of Immigration Appeal ("BIA"). This administrative appeal

dated October 9, 2002, was filed on November 5, 2002. Due to the affirmative misconduct of Defendants who refused to timely forward plaintiffs' appeal to the B1A despite repeated requests to do so by plaintiffs' attorney the BIA did not give a decision on plaintiffs' case until June 16, 2005. Whereupon the B1A summarily affirmed the decision of the district director without addressing constitutional issues raised by the plaintiffs or considering compelling evidence submitted by the plaintiffs. Relying instead on the same evidence that plaintiff, Mrs. Ayanbadejo, Mr. Ayanbadejo's spouse had rebutted and showed to be demonstrably false and mischaracterized evidence truthfully given by Mrs. Ayanbadejo that employment and the ordinary course of career choices necessitated Mr. and Mrs. Ayanbadejo temporarily living apart. Compelling evidence submitted to defendant, which defendant ignored or gave no weight to, clearly shows that though Mr. and Mrs. Ayanbadejo temporarily lived apart they still communicated like other couples similarly situated and established a life together. As a result of confusion arising from the passage of the REAL ID Act and to preserve Plaintiffs' appeal rights following advise from the Clerk's Office of the Fifth Circuit Court of Appeal; Plaintiff John Ayanbadejo timely appealed the BIA's June 16, 2005 decision to the Fifth Circuit Court of Appeal who declined jurisdiction and denied Mr. Ayanbadejo's motion for reconsideration in opinion dated March 15, 2006. Thus no further administrative proceedings are required and this Court's jurisdiction is properly invoked pursuant to 8 U.S.CA. § 1329, 28 USC §§1331, 1346(aX2), 1361, 2201-2202, 5 U.S.C. 701, et seq., 706(1), 555(b), 557 and Rule 57 of the Federal Rules of Civil Procedure.

CAUSE OF ACTION

15. A United States citizen spouse can petition for an adjustment of status for a spouse as an immediate relative. A United States citizen who wishes to obtain permanent residence for a spouse files a petition on Form I-130. Supporting document must be filed as follows:

I. A certified copy of the record of marriage.

II. Proof of termination of any prior marriages of either party, i.e., a certified copy of each applicable divorce or annulment decree or death certificate of prior spouse, as applicable.

III. Proof of United States citizenship of the petitioning spouse if United States citizen by birth may be accomplished by submitting petitioner's U.S. passport or birth certificate.

IV. Biographic forms G-325A for both petitioner and beneficiary.

V. One "ADIT" type photo of the petitioner and of the beneficiary.

The petition is filed with the USCIS office having jurisdiction over the place of residence of the petitioning United States citizen or beneficiary, and should be accompanied by a check or money order for the appropriate amount payable to the USCIS. On or about February 17, 1997, plaintiff Ms. Felicia Malveaux then a thirty year old United Stales citizen filed an I-130 petition to classify her spouse, plaintiff Mr. Ayanbadejo then a thirty-two year old Nigerian citizen as an immediate relative adjustment of status applicant.

16. Mrs. Ayanbadejo submitted all the requisite documents as stated by the defendants' policy and regulations.

17. On or about December 5, 2000 after an interview to adjust the beneficiary's Mr. Ayanbadejo's status to that of lawful permanent status, the USCIS requested additional

documentation from the petitioner. Specifically, the USCIS requested proof of cohabitation, immunizations for the beneficiary and a letter of employment. Said documents were provided as requested.

18. On or about December 5, 2000 the USCIS issued a notice of intent to deny the visa petition, on an alleged finding that petitioner had not established the eligibility for the benefit sought. The USCIS stated that an alleged investigation revealed different addresses for Mrs. Ayanbadejo and Mr. Ayanbadejo during July 1997 and another time period, which the USCIS failed to specify. Mrs. Ayanbadejo responded to aforementioned notice with an affidavit dated January 24, 2001 in which the address discrepancies were rebutted, explained and shown to be demonstrably false.

19. On or about April 17, 2001, due to lack of response from the USCIS Mrs. Ayanbadejo on advise of her then lawyer Mr. Dee N.A. Waobikeze filed another Form I-130 ostensibly under the LIFE Act as she was advised by her lawyer and was again interviewed. On June 26, 2002 the USCIS issued a second Notice of Intention to Deny on grounds that Mrs. Ayanbadejo and Mr. Ayanbadejo were living separately and that the documentation submitted by Mrs. Ayanbadejo was insufficient to establish eligibility for the benefit sought. Mrs. Ayanbadejo responded by providing additional documentation and an affidavit dated July 17 2002. In her said affidavit Mrs. Ayanbadejo explained that career and employment choices necessitated the couple Irving apart temporarily.

20. On October *9,* 2002 USCIS issued a Notice of Denial based on an unconstitutional allegation that Mr. Ayanbadejo and Mrs. Ayanbadejo were living apart and that evidence showing intention to establish a life together was insufficient to establish a bona fide marriage.

21. There are no federal dictates about the kind of life that married partners should lead. Any attempt to regulate life styles and specify the requirements of bona fide marriage would raise serious constitutional questions. *See Bark* v. *INS,* 511 F.2d 12022 (9th Cir. 1975). Evidence to establish intent to live a life together may take many forms including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, joint income tax forms, or bank accounts etc. *See Matter of Phillis,* 15 I. & N. Dec. 385 (BIA 1975).

22. In accordance with defendant's requests, policies and regulations Mr. Ayanbadejo and Mrs. Ayanbadejo submitted compelling evidence, which time and again has been deemed sufficient to establish eligibility for the benefit, sought. Mr. Ayanbadejo and Mrs. Ayanbadejo to establish the bona fides of their marriage submitted *Federal documents:* specifically Federal Tax returns, correspondence between the Federal Internal Revenue Service (FIRS) and Mr. Ayanbadejo and Mrs. Ayanbadejo, a Federal installment agreement dated 6/14/02; 2000 and 2001 Social Security statements; *State of New York Documents:* 2000 New York State *Nonresident* Income Tax Returns, New York State Employment Retirement and Benefit form listing Mrs. Ayanbadejo as beneficiary of the accounts, which included a life insurance policy of over $100,000; New York Office of Temporary & Disability Assistance Post Employment Information form listing Mrs. Ayanbadejo as an emergency contact; Change of Address form from Mr. Ayanbadejo where Mrs. Ayanbadejo is again listed as emergency contact; employment letter from New York State Office of Temporary & Disability Assistance to Mr. Ayanbadejo dated 6/6/01 confirming employment as Hearing Officer, Acknowledgement letter from New York City Department of Finance regarding Administrative Law Judge position; copies of pay check stubs from New York State showing Mr. Ayanbadejo's marital status of married (Mr.

Ayanbadejo worked within the vicinity of the World Trade Center and witnessed first hand the collapse of the Twin Towers; the evidence submitted from New York State is especially very poignant and pertinent because if as Mr. Ayanbadejo's spouse Mrs. Ayanbadejo feared he had been a victim of the World Trade Center tragedy, ***no court no matter how irrational with the most basic understanding of the law,*** with all the compelling evidence submitted, will have failed to recognize Mrs. Ayanbadejo as Mr. Ayanbadejo's spouse thereby entitling her to hundreds of thousands in employment and other death benefits); *State of Texas voter registration card, Jefferson County* - for Mr. Ayanbadejo showing same address with Mrs. Ayanbadejo; *Joint Account Bank Statements* - from Wells Fargo, Bank United, Washington Mutual, Mobil Oil Federal Credit Union in Beaumont and Bank Statement from Citibank; *Bank Credit Card correspondence* - from Bank United, Mobil Oil Credit Union and Wells Fargo; *Airline Boarding Passes and Itineraries* - showing travel between New York and Houston, Texas including boarding passes from AirTran 9/30/00 - 10/7/00; 01/24/01; U.S. Airways 4/12/01 - 4/16/01; TWA boarding passes 7/16/01 - 7/19/01; *Cell Phone Bill from Sprint* - 8/01.

23. The USCIS expressed doubt as to the validity of the marriage based upon an unconscionable and unconstitutional finding that because Mrs. Ayanbadejo was sole signatory on some checks from a Joint Bank in which Mr. Ayanbadejo contributed majority of the funds the activity was insufficient to show a bona fide marriage - Notwithstanding the fact that numerous surveys of most households in America today including probably this Court's shows that the female spouse control the household finances (one wonders what country the USCIS lives in). In evaluating the evidence the USCIS may not abuse its discretion by mischaracterizing evidence or by assigning requirements that constitute "sufficient activity". *See Bark supra* and *Rodriguez-Gutierrez* v. *INS,* 59 F.3d 504 (5th Cir. 1995).

24. Plaintiff John Ayanbadejo was and remains *prima facie* eligible for an adjustment of status and naturalization since at the time of filing his application for an adjustment of status:

a. Mr. Ayanbadejo speaks and understands English very fluently, is of very good moral character during the period for which good moral character is required (Mr. Ayanbadejo and Mrs. Ayanbadejo are both Catholics and Mr. Ayanbadejo has no criminal record of any kind) and is firmly attached to the principles of the United States Constitution both as an officer and member of this Court in good standing, as a member of the Courts in New York both Federal and State in good standing, and as a former Hearing Officer with the State of New York. INA § 316,8 U.S.C. § 1427.

b. Mr. Ayanbadejo had lawfully been admitted to the United States, had established a life together with his United States citizen spouse, Ms. Felicia Matveaux for more than the requisite two years for an adjustment of status and more than the requisite five years for naturalization. Mr. Ayanbadejo has United States citizen siblings who are of equally excellent moral character and he has lawfully resided in the United States for about ten years with no crimina! record. Mr. Ayanbadejo has met all the physical presence requirements for both an adjustment of status and naturalization.

c. In an age of low or poor integrity displayed in society today, Mr. Ayanbadejo in the contrary is a person of high integrity, has been given an excellent recommendation by one of his former bosses in the State of New York, Supervising Administrative Law Judge and former Colonel of the United States Army in the Judges Advocate General division, Col. James E. Brown (Rtd.). He is

an asset anywhere he chooses to go and he will be an excellent choice for Junior Partner in the Law Offices of O.J. Lawal & Associates, if he so wishes to work with the office.

d. The grounds asserted by the USCIS in support of its denial - that because Mr. Ayanbadejo and Mrs. Ayanbadejo were living separately and because Mrs. Ayanbadejo was sole signatory on a joint account where the majority of the funds were provided by Mr. Ayanbadejo - is highly irrational, unconscionable, unconstitutional, not warranted by law and Mr. Ayanbadejo is eligible for an adjustment of status and naturalization. In an age where modern couples have to do what they can within the boundaries of the law to live the American dream, Mr. Ayanbadejo and Mrs. Ayanbadejo marriage was no different from the millions of other couples striving to achieve the American dream Defendants' conduct is an impermissible unconstitutional interference with this dream.

25. Mr. Ayanbadejo and Mrs. Ayanbadejo had clearly more than established the bona fides of their marriage and *prima facie* eligibility for the benefit sought.

26. Mr. Ayanbadejo and Mrs. Ayanbadejo contends that defendant's decision on Mr. Ayanbadejo's adjustment of status application was arbitrary, capricious, an abuse of discretion, unconstitutional and otherwise not in accordance with the law. Defendants made no attempt in giving weight to the plethora of compelling evidence submitted in Mrs. Ayanbadejo's application instead it impermissibly and unconstitutionally relied on evidence which had been mischaracterized, proven to be demonstrably false and espouses incorrect legal conclusions.

27. Mr. Ayanbadejo and Mrs. Ayanbadejo further contend that the Defendant in its decision that plaintiffs' marriage was one entered into to circumvent immigration laws, in denying Mrs.

Ayanbadejo's application and in subsequent proceedings failed to follow their own rules, policies and regulations.

i. The United States Supreme Court and the Court of Appeal has held that: "Though the agency's discretion is unfettered at the outset, if it announces and follows - by rule or settled course of adjudication - a general policy by which its exercise of discretion will be governed, an irrational departure from the policy (as opposed to an avowed alteration of it) would constitute action that must be overturned as "arbitrary, capricious [or] an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1)(A). *See INS* v. *Yueh-Shiao Yang*, 519 U.S. 26, 117 S. Ct. 350, 353 and *Agnes Cho v. Gonzales*, 404 F. Supp.3d 96 (1st Cir. 2005). Further the Supreme Court and Fifth Circuit Court of Appeals has held that the failure of defendants to follow its own regulations and its own precedent is a violation of due process. See *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260, 267-68 (1954) and *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 n. 48 (5th Cir. 1982). Federal power is not so plenary that any agent of the national government may arbitrarily subject all resident aliens to different substantive rules than those applied to citizens. U.S.C.A. Const. Amend. 5. *See Hampton* v. *Mow Sun Wong*, 96 S. Ct 1895, 426 U.S. 88, 48 L. Ed. 2d 495. Finally, resident aliens are entitled in their persons and effects to the protection of United States laws. See *Carlson* v. *London*, 72 S. Ct 525, 342 U.S. 524.

ii. Mr. and Mrs. Ayanbadejo sincerely believes that their case fells squarely within the parameters and safeguards set forth by the Supreme Court and Court of Appeals and are therefore entitled to the protection of this Court against the

unconstitutional, unlawful and arbitrary and capricious actions of the defendants. The position of the Government was and is not substantially justified under the EAJA, 28 USC §2412(d)(1)(B).

PRAYER

WHEREFORE, in view of the arguments and authority noted herein, Mr. Ayanbadejo and Mrs. Ayanbadejo respectfully prays that the defendants be cited to appear herein and that upon due consideration, the Court:

a. Issues a writ of mandamus requiring Defendants to submit the records of its proceedings and decision in connection with Mrs. Ayanbadejo's adjustment of status application denial to this court for review in accordance with this Court's jurisdiction and Plaintiffs Mr. Ayanbadejo's FOIA request dated November 29, 2005 in which Defendants acknowledged receipt on December 22, 2005.

b. Considers Mrs. Ayanbadejo's application for adjustment of status filed on behalf of her spouse Mr. Ayanbadejo, the beneficiary *de novo*, as authorized by INA §§ 201(b), 204(b), 291 and his eligibility for naturalization as authorized by INA § 310(c), 8 U.S.C. §14 21(c);

c. Enter an order vacating the Defendants' decision declaring plaintiffs' marriage a sham the basis of the denial of Mrs. Ayanbadejo's adjustment of status application, and declaring that Mr. Ayanbadejo is *prima facie* eligible for an adjustment of status and naturalization;

d. Order Mrs. Ayanbadejo's application for an adjustment of status remanded for prompt consideration by the Defendants under the correct constitutional legal standards;

e. Order that Mr. Ayanbadejo and Mrs. Ayanbadejo be awarded reasonable attorney's fees; and

f. Further order that Mr. Ayanbadejo and Mrs. Ayanbadejo be granted such other relief at law and in equity as justice may require.

Dated this 7th day of April 2006.

Respectfully Submitted,

O.J. LAWAL & ASSOCIATES, P.C.
8700 Commerce Park Drive, Suite 202
Houston, Texas 77036
Email: ojlawal24@msn.com
TEL: (713)773-0600
FAX: (713)773-0699

By: _____
O.J. Lawal, Esq.
SBN: 24004144
FBN: 23500

ATTORNEY FOR PLAINTIFFS
MR. AYANBADEJO AND MRS. AYANBADEJO

CERTIFICATE OF SERVICE

I certify that I served by certified mail return receipt requested, on April 7, 2006, a true copy of the foregoing complaint on the following parties through their known attorney:

1. Michael Chertoff, Secretary, U.S. Department of Homeland Security,
2. Evelyn M. Upchurch, District Director, Texas Service Center
3. U.S. Citizenship & Immigration Services

U.S. Attorney's Office
910 Travis, Suite 1500
Houston, Texas 77002

By: _____
O.J. Lawal, Esq.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Prappas, Elaine F.
4151 SW Freeway, Suite 380
Houston, TX 77027-7325

Office of the District Counsel/HOU
126 Northpoint Drive
Houston, TX 77060

Name: John Ayanbadejo **A76-828-558**

Date of this notice: 06/16/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Frank Krider
Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A76-828-558 – Houston

Date: JUN 16 2005

In re: John Ayanbadejo, Beneficiary of a visa petition filed by Felicia Ayanbadejo, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Prappas, Elaine F.

ON BEHALF OF DHS: Pauline A. Appelbaum

ORDER:

PER CURIAM, The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

In The Matter of

Felicia Dyrrall Ayanbadejo
(Beneficiary)

John Henry Ayanbadejo
(Petitioner)

A 76-828-558

(USCIS Houston, Texas, District Office)

☒ In Visa Petition Proceedings

☐ In Visa Petition Revocation Proceedings

DEPARTMENT OF HOMELAND SECURITY'S RESPONSE TO THE APPEAL

The Department of Homeland Security requests that the Board dismiss the appeal for the following reason(s):

☐ The notice of appeal does not include a statement that identifies the findings of fact, the conclusions of law, or both, that are being challenged. 8 CFR § 1003.3(b).

☐ The appealing party indicated that a brief in support of the appeal would be filed, but the time within which the brief was to be filed has passed and no brief has been filed. 8 CFR § 1003.3(b).

☐ The notice of appeal was not filed timely. 8 CFR § 1205.2(d).

☐ The appealing party is not an "affected party." 8 CFR § 1003.3(a)(2), and thus lacks standing to appeal in this case. The appeal was filed by ☐ the beneficiary, ☐ the beneficiary's attorney, ☐ an attorney who has not filed a notice of appearance as required by 8 CFR § 1003.3(a)(2) and (a)(3).

☐ The appeal and all attachments are not in English or accompanied by a certified English translation. 8 CFR § 1003.3(a)(2).

☒ The record as a whole indicates that the Board should not disturb the decision in this case. The Department of Homeland Security will rely upon the Decision of the District Director without further briefing.

☒ Other: Petitioner says a brief was filed using the wrong A#. The Service does not have the brief in the A file.

Dated: Houston, TX
April 18, 2005

Respectfully submitted,
Pauline A. Applebaum
Pauline A. Applebaum
USCIS Associate Area Counsel
126 Northpoint, Room 1173
Houston, TX 77060
281-774-4651

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2005, I served a copy of the within document by regular first class mail upon the following:

Elaine F. Proffas, Esq.
6200 Gulf Freeway, Suite 400
Houston, TX 77023

Pauline A. Applebaum
(Signature)

Form I-30 rev. (12/1/97)

Ayanbadejo-000004

of the Associate Area Counsel

U.S. Department of Homeland Security
126 Northpoint Room 1173
Houston. Texas 77060

U.S. Citizenship and
Immigration Services

April 18,2005

Elaine F. Prappas
Attorney at Law
6200 Gulf Freeway, Suite 400
Houston, TX 77023

RE: Visa Petition Appeal, A76-828-558

Dear Ms. Prappas:

Please be advised that the visa petition appeal that you filed on November 5, 2002, has been forwarded to the Board of Immigration Appeals on today's date, together with the entire Record of Proceeding including the Form I-130 and supporting documentation, the Service's Notice of Intent to Deny, any rebuttal, and the final denial. On April 13, 2005, you wrote me asking me to "correct" various errors in your use of the A number on a brief you apparently submitted. Please be advised that the brief using the wrong A number has never been received to the A file for submission to the Board, Also, please be advised for future reference that any amendments necessary to legal work submitted by your office must be corrected by your office. If you have retained a copy of the brief showing timely submission, please forward a copy both to the Board and to my attention for placement in the administrative file. Enclosed please find the Department of Homeland Security's response to the appeal.
Sincerely,

Pauline A. Appelbaum

U.S. Department of Justice
Immigration and Naturalization Service
126 Northpoint Dr.
Houston, Texas 77060

OCT 09 2002

A 76 828 558

Felicia Dyrnall Malveaux
2290 Katy Road
Beaumont, Texas 77706

NOTICE OF DENIAL

Dear Ms. Malveaux:

Reference is made to the Petitions for Alien Relative (Form 1-130) filed on behalf John Henry Adedayo Ayanbadejo on March 3, 1997 and April 17, 2001.

Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966), states that the burden of proof to establish eligibility for the benefit sought lies with the petitioner.

In Matter of M, 8 I&N Dec.217, it was determined that where no bona fide husband-wife relationship was intended, the marriage is deemed invalid for immigration purposes regardless of whether it would be considered invalid under domestic law of the jurisdiction where performed.

On January 29, 2002, you were issued a "Notice of Intent to Deny Visa Petition" (intent). The Service received your response to that intent. The information that you submitted included photographs, income tax information, one "letter" and your affidavit. You failed to submit sufficient documentary evidence to overcome the intent to deny.

At the time of interview, you acknowledge that you reside in Beaumont, Texas and that your husband has been living in the New York/New Jersey area since October 2000. You acknowledged that you have never visited you husband in New

New York or New Jersey since he moved there almost two years ago. Although your husband has made trips to Houston, you have failed to provide evidence of any contact with your husband during those visits. You stated that your husband's family lives in Houston and that he frequently stayed there (not with you in Beaumont) prior to his move out of state. You provided no evidence of telephonic communication with your spouse, such as long distance telephone bills. Your "letters" to your spouse consisted of one three-sentence note stating you were forwarding income tax papers to his New York address. That letter was postmarked AFTER the interview. The evidence you have submitted fails to establish eligibility for the benefit sought. You have provided insufficient evidence that a bona fide husband-wife relationship was intended.

Therefore it is the decision of the Service to deny the petition. Based on the aforementioned, it is the decision of the Service that the beneficiary entered into a marriage with you for the purposes of circumventing immigration law. Section 204 (c) of the Immigration and Nationality Act precludes the approval of a petition when the alien enters into a marriage for the purpose of circumventing immigration law.

You may appeal this decision. You must submit an appeal to this office with a filing fee of $110.00. If you do not file an appeal within the time allowed, this decision is final. It must reach this office within thirty days from the date this notice is served. Do not send you]- appeal directly to the Board of Immigration Appeals. If you have any questions concerning this matter, please feel free to contact this office.

Sincerely,

Hipolito M. Acosta
Acting District Director

AFFIDAVIT OF O.J. LAWAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATE OF TEXAS §
§
COUNTY OF HARRIS §

O.J. LAWAL, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of Texas. I am a member of the bar of the United States District Court, Southern District of Texas, Houston Division and one of the attorneys of record for Plaintiffs-Appellants Mr. John Ayanbadejo and Mrs. Felicia Malveaux Ayanbadejo in the District Court.
2. After the Final judgment in the District Court was rendered on or about September 15, 2009, my office received a copy of the said judgment via fax number 713-773-0699. A copy of the received copy of the said judgment via fax is attached as Exhibit "AL 1".
3. My office however did not contact Mr. John Ayanbadejo and Mrs. Felicia Malveaux Ayanbadejo timely about the receipt of the said judgment.
4. When my client Mr. Ayanbadejo eventually received notice of the Court's said decision on or about 3/29/2010, more than 21 days after

the entry of judgment, my assistant Ms. Dennis Ayala notified Mr. Ayanbadejo of the recent receipt of some Court documents.

5. Mr. Ayanbadejo came into my office to retrieve the documents recently received from the Court and in good faith asked my assistant, Ms. Dennis Ayala whether my office had received the District Court's said Final Judgment given on or about 9/15/2009, my assistant inadvertently misinformed Mr. Ayanbadejo that my office had never received any judgment given by the court on or about 9/15/2009.

6. After Mr. Ayanbadejo had submitted his applications to re-open the time for Appeal before the District Court and its eventual denial by the Court and appeal to the Fifth Circuit Court of Appeals and eventual denial by the Fifth Circuit on jurisdiction, Mr. Ayanbadejo came into my office several times, but he was unable to see me.

7. Eventually, Mr. Ayanbadejo was able to see me and I informed him that my office had received more documents from the District Court on his case than my secretary had informed him.

8. Mr. Ayanbadejo came into my office several times to retrieve the documents, but my assistant left the office at 2:30p.m., before Mr. Ayanbadejo could get to the office.

9. Eventually, on or about 10/22/2010, Mr. Ayanbadejo was able to retrieve the documents received from the District Court

from my office and included in the documents was the said final judgment given by the District Court.

10. The error of Mr. Ayanbadejo's untimely receipt of the Court's Judgment was due to my office's not notifying Mr. Ayanbadejo timely.

11. Mr. Ayanbadejo is a very hardworking person who has no criminal record and is of good character. From a perusal of the evidence submitted in his immigration case Mr. Ayanbadejo may be eligible for the immigration relief he seeks.

12. I strongly urge the Court in the interest of justice, fairness, and on constitutional grounds to grant Mr. and Mrs. Ayanbadejo the relief they seek.

13. All of the facts stated in this Affidavit are made from my own personal knowledge.

I signed this Affidavit on 10.25.10 at HOUSTON, Texas

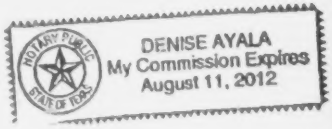
O.J. LAWAL

SUBSCRIBED AND SWORN TO BEFORE ME on October 25, 2010 at Houston Texas, as attested to by my seal and signature as set out below.

Signature Denise Ayala

Name Denise Ayala

Notary Public in and for the State of Texas



My Commission expires:

Date 8.11.2012

AFFIDAVIT OF AMBROSE O'NEAL, ESQ., COUNSEL TO THE PLAINTIFFS

STATE OF TEXAS §
§
COUNTY OF HIDALGO §

Ambrose O'Neal, being duly sworn, deposes and states:

1. "My name is Ambrose O'Neal. 1 am over 18 years of age. My new contact address is 1616 E. Griffin Pkwy. # 121, Mission, Texas 78572, former address is P. O. Box 722354, Houston, Texas 77272, from which all my mail is forwarded to the new contact address; and e-mail is lawoneal@yahoo.com. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts slated in this affidavit are true and correct.

2. I am the current Counsel of Record for John Ayanbadejo and Felicia Malveaux Ayanbadejo in this matter and am a member of the Bar of this Court. I make this affidavit in support of the Motion to Reopen Time to Appeal.

3. On or about 2/27/2009, Plaintiff John Ayanbadejo hired me as additional counsel to represent them, the plaintiffs, for the remand proceeding and for possible further Appeals.

4. On or about 2/28/2009, Mr. Ayanbadejo who is admitted to the United States District Court, Southern District of Texas, Houston, filed on my behalf ray Notice of Appearance giving the Court my contact information and e-mail address for notification purposes and the corrected response in opposition to motion for summary judgment.

5. Mr. Ayanbadejo occasionally contacted me regarding the status of the case and enquired if I have received any notice of issuance of the judgment from the Court, Since I have not received any such document or information from the Court, he was advised the same.

6. On or about 3/27/2010. concerned that he still has not heard anything from the Court or from any counsel representing them, the plaintiffs, Mr. Ayanbadejo contacted me and I informed him that I still have not heard or received anything from the Court and however informed him that I have recently changed office address, but all my mail was forwarded to my new office address and of the need to change the address with the Court.

7. On or about 3/29/2010, Mr. Ayanbadejo e-mailed me a copy of the Court's decision. A copy of Mr. Ayanbadejo's e-mail is attached as Exhibit "1".

The exhibits attached to this Motion are true and correct copies of the documents filed in this court or as viewed by me in the filing of this application as provided."

_____

Ambrose O'Neal, Affiant

SWORN TO and SUBSCRIBED before me by **Ambrose O'Neal,** on March 31, 2010.

_____

Notary Public in and for
the Stale of Texas

From: John Henry (johnhenryesq@yahoo.com)
To: lawoneal@yahoo.com;
Date: Mon, March 29, 2010 3:46:00 PM
Cc:
Subject: Ayanbadejo v. Napolitano (Very Urgent)

Hi Ambrose,

I went this morning to get a copy of the decision from the Court as Salvador Colon has still failed, refused, and or neglected to send me a copy. Please find attached the decision of the Court.

Thanks,

John-Henry

**********CONFIDENTIALITY NOTICE**********
To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

This e-mail (including attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, is confidential and is legally privileged including, without limitation, attorney-client privilege. If you are not the intended recipient, you are hereby notified that any retention, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please notify the sender by return e-mail, and delete it immediately.

Thanks for your cooperation in this matter.

STATE OF TEXAS §
§
HARRIS COUNTY §

AFFIDAVIT OF ELAINE F. PRAPPAS

On this day, 7TH of November 2006, Elaine F. Prappas, appeared before me, the undersigned notary public. After I administered an oath to her, upon her oath, she said:

1. "My name is Elaine F. Prappas. I am competent to make this affidavit. The facts stated in this affidavit are within .my personal knowledge and are true and correct.

2. I am the attorney that represented plaintiffs in their Appeal to the Board of Immigration Appeal (BIA) in *Re: Ayanbadejo,* Immigration case file number A76 828-558. As the attorney of record, I have personal knowledge of the facts stated in this affidavit, and they are true and correct.

3. In or about October of 2002, Mr. and Mrs. Ayanbadejo hired me, Ms. Elaine Prappas, to appeal the denial of their petition to adjust Mr. Ayanbadejo's status as an immediate relative of Mrs. Ayanbadejo.

4. On or about 11/5/2002 Ms. Prappas filed the Notice of Appeal dated 10/30/2002. Incorporated herein and attached as Exhibit "1" is a copy of the relevant pages of Ms. Prappas' Notice of Appeal.

5. On 9/20/2006 Mr. Ayanbadejo contacted our office and informed us that his attorneys had just noticed that the United States Citizenship and Immigration Services (USCIS) did not forward the brief, which our office had prepared for Mr. and Mrs. Ayanbadejo and timely forwarded the brief to the USCIS for onward transmittal to the BIA.

6. Mr. Ayanbadejo requested for a copy of proof of timely service of the aforesaid brief to the USCIS from my office on about September 19, 2006. However, I was out of the country at that time. My paralegal attempted to assist Mr. Ayanbadejo but she is not familiar with my court files and was unable to locate the necessary documents due to the volume of the file.

7. On 9/25/2006 with the assistance of a temporary associate that was standing in for me when I was out of the country my office staff gave Mr. Ayanbadejo an exact copy of the letter Ms. Prappas sent accompanying the brief and the certificate of return receipt indicating receipt by defendants. Incorporated herein and attached as Exhibit "2" is a copy of the accompanying letter Ms.

Prappas served on defendants and certified mail return receipt card signed by defendants as received for onward transmission to the BIA."

Elaine F. Prappas/Affiant

SWORN TO and SUBSCRIBED before me by 7th on November, 2006.

Notary Public in and for
the State of Texas

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS OF DECISION OF DISTRICT DIRECTOR

In the Matter:	Fee Stamp
John Henry Adedayo Ayanbadejo	

File Number: A 76 – 825 – 558

1. I hereby appeal to the Board of Immigration Appeals from the decision of the District Director, Houston, TX District, dated October 9, 2002, in the above entitled case.

2. Specify reasons for this appeal and continue on separate sheets if necessary. If the factual or legal basis for the appeal is not sufficiently described the appeal may be summarily dismissed. 1. The District Director erred in not considering all the evidence presented to them, in their determination that the marriage was a "sham". 2. Continued on the next page>>>>>>>>>>>>>>>>>>

3. I ☐ do ☑ do not desire oral argument before the Board of Immigration Appeals in Falls Church, Virginia.

4. I ☑ am ☐ am not filling a separate written brief or statement.

_____
Signature of Appellant
(or attorney or representative)

Elaine F. Prappas
(print or type name)

10/30/2002
Date

Prappas & Associates
4151 Southwest Freeway, Ste. 380
Houston, TX 77027
Address *(number, street, city, state, Zip Code)*

FORM EOIR-29
JAN. 89

2. District Director erred in his findings that the Petitioner and Beneficiary failed to establish a bonafide marital relationship.

3. District Director abused his discretion and acted in an arbitrary and capricious manner

4. District Director erred in not considering all of the evidence submitted to establish co-habitation, which supports the validity of a bonafide marriage.

5. Petitioner reserves the right to expand and submit additional issues at the time of filing of Petitioner's brief.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FELICIA DYRNALL MALVEAUX
Petitioner/Appellant

John Henry Adedayo Ayanbadejo
Beneficiary

File # A 76 828 558

BRIEF IN SUPPORT OF APPEAL OF DENIAL OF I-130 ALIEN RELATIVE PETITION

Respectfully Submitted,

Elaine F. Prappas
Attorney for Appellant
4151 Southwest Freeway #380
Houston, Texas 77027
(713) 960-0099
(713) 960-9496

BRIEF IN SUPPORT OF APPEAL OF DENIAL OF I-130 ALIEN RELATIVE PETITION

FACTS

On February 10, 1997 the Petitioner, a thirty-four year old United States citizen, married the Beneficiary, a thirty-seven year old citizen of Nigeria, On February 17, 1997, the Petitioner filed an I-130 alien relative petition on behalf of the Beneficiary seeking to accord the Beneficiary immediate relative status. On December 16, 1999, after an interview to adjust the Beneficiary's status to that of lawful permanent status, the Bureau of Citizenship and Immigration Services (BCIS) requested additional documentation from the Petitioner. Specifically, the BCIS requested proof of cohabitation, immunizations for the Beneficiary and a, letter of employment. Said documents were provided as requested.

On December 5, 2000 the BCIS issued a notice of intent to deny the visa petition based on a finding that Petitioner had not established the eligibility for the benefit sought. The BCIS stated that an investigation revealed different addresses for the Petitioner and Beneficiary during July 1997 and another time period, which the BCIS fails to specify. The Petitioner responded to said notice with an affidavit dated January 24, 2001 in which address discrepancies were explained and rebutted.

On April 17, 2001 due to lack of response from the BCIS the Petitioner filed another Form I-130 and was again interviewed. On June 26, 2002 the BCIS issued a second Notice of Intention to Deny on grounds that the Petitioner and Beneficiary were living separately and that documentation submitted by Petitioner was insufficient to establish eligibility for the benefit sought. Petitioner responded by providing additional

documentation and an affidavit dated July 17, 2002. In her affidavit Petitioner explained that career and employment choices necessitated the couple living apart temporarily.

On October 9, 2002 the BCIS issued a Notice of Denial based upon the fact that Petitioner and Beneficiary were living apart and that telephone and written communication between the two since living temporarily apart was insufficient to establish a bona fide marriage.

ISSUES

1. The District Director erred by failing to consider all the evidence submitted and in finding that the Petitioner and Beneficiary failed to establish a bona fide marital relationship.
2. The District Director erred in relying on the fact that Petitioner and Beneficiary are temporarily living apart to find that no bona fide marital relationship exists.
3. The District Director abused his discretion and acted in an arbitrary and capricious manner.

Issue #1
Bona Fide Marriage

Where there is reason to doubt the validity of the marital relationship, the Petitioner must submit evidence to establish that the marriage was not entered into for the purpose of circumventing the immigration laws. *Matter of Phillis, 15 I&N. Dec. 385 (BIA 1975).* The test of the viability of a marriage is whether the parties intended to establish a life together at the time they married. There are no federal dictates about the kind of life that partners should lead. In fact, any attempt to regulate life styles and specify the requirements of a bona fide marriage would raise serious constitutional

State of New York Documents- Beneficiary's 2000 New York State Nonresident Income Tax Return; New York State Retirement Form listing Petitioner as beneficiary of the account; New York Office of Temporary & Disability Assistance Post Employment Information form listing Petitioner as an emergency contact; Change of Address form from Beneficiary to New York agency where Petitioner is again listed as emergency contact; employment letter from New York State Office of Temporary & Disability Assistance to Beneficiary dated 6/6/01 confirming employment as a Hearing Officer; employment letter from New York City Department of Finance regarding Administrative Law Judge position; copies of check stubs from New York showing marital status of & married.

State of Texas voter registration card Jefferson County - for Beneficiary showing Beaumont, Texas address;

Bank Statements - from Wells Fargo, Bank United, Washington Mutual, Citibank; Mobil Oil Federal Credit Union;

Bank Credit Card correspondence- from Bank United, Mobil Oil Credit Union and Wells Fargo;

Airline Boarding Passes and Itineraries - showing travel between New York and Houston, Texas including boarding passes from AirTran 9/30/00 - 10/7/00; 01/24/01; US Airways 4/12/01 - 4/16/01; TWA boarding passes 7/16/01 - 7/19/01;

Cell phone bill from Sprint for 8/2001;

The BCIS expressed doubt as to the validity of the marriage based upon its decision that the activity in a joint bank account was insufficient to show a bona fide marriage. In evaluating the evidence the BCIS may not abuse its discretion by assigning

questions. *Bark* v. *BCIS, 511 F.2d 12022 (9th Cir. 1975).* Evidence to establish intent may take many forms including, but not limited to, proof that the beneficiary has been listed as the Petitioner's spouse on insurance policies, property leases, joint income tax forms, or bank accounts... *Matter of Phillis, supra.* The conduct of the parties after marriage is relevant to their intent at the time of marriage. *INA S.201 (b), 8U.S.C s. 1151(b).*

A visa petition filed on behalf of an alien that attempts or conspires to enter into a marriage for the purpose of evading immigration laws will be denied. The evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative. Factual findings underlying a Service decision that a Beneficiary entered into a fraudulent marriage must be supported by substantial evidence. Age disparity, lack of various joint accounts, and the Petitioner's continued use of her prior husband's name do not meet the substantial and probative threshold. *In re Jose Kleber Iturralde-Reinoso 18 Immig. Rptr. B1-240 (BIA 1998).* The Board further stated that "...a joint 1994 Federal Tax Return is of significant value in establishing that the Petitioner and Beneficiary were developing a marital household." *In re Jose, supra.*

The following is a partial list of documentary evidence submitted by Petitioner:

Federal Documents - Beneficiary's 1997 and 1998 Federal Tax Returns showing status of married filing separately; 1999 and 2000 Federal Tax Returns showing status of married filing jointly; correspondence between the Internal Revenue Service (IRS) and Petitioner and Beneficiary dated 3/27/01, 6/3/01, 6/11/01, 6/18/01, and an Installment Agreement dated 6/14/02; 2000 and 2001 Social Security Statements for Beneficiary.

requirements that constitute "sufficient activity". The concept of establishing a life as marital partners contains no federal dictate about the kind of life that the partners may choose to lead. Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of bona fide marriage would raise serious constitution questions *Bark, supra.*

In the present case the Petitioner and Beneficiary jointly opened the account. There is no allegation that the account was a forgery or was used for illegal purposes. What a couple chooses to do with their joint account is not within the discretion of the Attorney General to determine. The only question presented was whether the account was a joint account and the evidence presented clearly shows both parties named and using the account.

Petitioner submitted evidence which time and again has been deemed sufficient to establish eligibility for the benefit sought. Documentary evidence submitted in this case clearly meets the level of proof required and tracks the forms of proof suggested by the Board in *Matter of Phillis, supra.* Evidence to establish intent may take many forms. The relevant inquiry to be made is whether the parties intended to establish a life together when they exchanged marriage vows *In Re: Burcena 11 Immig. Rptr. B1-28.* The suggested list of evidence in *Burcena* is not exhaustive. The BCIS abused its discretion by relying on minute discrepancies in the parties addresses during the first year of marriage that were sufficiently rebutted by petitioner in her affidavit. The parties have preferred appropriate evidence to refute the BCIS's doubt as to intent at the time of

marriage. The BCIS has failed to establish by substantial and Probative evidence that the marriage is not a bona fide relationship.

Issue #2
Temporary Separation

The District Director erred in relying on the fact that Petitioner and Beneficiary 1are temporarily living apart to find that no bona fide marital relationship exists. The key issue is whether the parties intended to establish a life together at the time of the exchange of wedding vows. Aliens cannot be required to have more conventional or ore successful marriages than citizens *Whetstone v. BCIS 561 F.2d 1303 (9th ctr 1977).* Couples separate, temporarily and permanently, for all kinds of reasons that have nothing to do with any pre-conceived intent not to share their lives, such as call to the military service, educational needs, employment opportunities, illness, poverty, and domestic difficulties *Sang Chul* v. *BCIS. 511 F.2d 1200 No. 72-31433 (1975).* Conduct of the parties after the marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married...But evidence of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered *Barks v. INS, 511 F. 2d 1200 (9th Cir. 1975*

Where there is no evidence the parties have legally separated or dissolved their marriage, a visa petition filed on behalf of the alien spouse should not be denied solely because the parties are not residing together *Matter of Lenning 17 IN. Dec. 476 Interim Dec. #2817 (BIA 1980).* Separation in and of itself is no longer a valid basis for denial of a visa petition...the Service could not deny; the visa petition solely because the parties

were no longer living together *Matter of McKee 17 I.N. Dec. 332 Interim Decision #3782 (BM 1980), In Re: X9 Immig. Rptr. B2-87.*

In the instant case Petitioner informed the BCIS by affidavit that she and her husband sometimes lived apart because of employment opportunities. The Beneficiary worked in Houston, Texas during the marriage while living in Beaumont, Texas, a distance of over 100 miles. Petitioner in her affidavit stated the Beneficiary would return home on weekends but stay with family in Houston during the week. Furthermore, Petitioner stated in her affidavit dated July 17, 2001 that her husband was a licensed attorney under Nigerian law but not under Texas law. To pursue his legal career the Beneficiary had the choice to move to California or New York where his law license would be recognized. After working for a period of time as a lawyer the Beneficiary would then be accorded recognition by the Texas State Bar. Clearly the Beneficiary was acting in the best interest of the parties by pursuing employment consistent with his training and skills. Further evidence is offered in the form of federal tax returns showing an increase in income for the couple. Sufficient probative evidence was submitted by the parties to explain the temporary separations.

The BCIS incorrectly asserts that there was no communication between the Petitioner and Beneficiary during the separation. This is a blatant misstatement of the evidence. As previously stated the Petitioner submitted documentary evidence of travel between New York and Texas, copies of written correspondence and a copy of a cell phone bill. To allow the BCIS to determine what is sufficient contact and communication between a couple raises serious constitutional issues

CONCLUSION

The relevant issue is whether the Petitioner and Beneficiary intended to establish a life together at the time of their marriage. Based upon the evidence submitted and the interview of the Petitioner and Beneficiary that question is answered in the affirmative. The BCIS has failed to show by substantial and probative evidence that minor discrepancies outweighed the plethora of evidence submitted by Petitioner and Beneficiary to show a bona fide marriage.

For the foregoing reasons it respectfully is requested that the decision of the BCIS be reversed and the application of the Petitioner be granted.

Respectfully submitted,

Elaine F. Prappas

Attorney for Respondent

ATTORNEYS AT LAW

Prappas

& Associates

December 11,2003

United States Department of Justice
Bureau of Citizenship
126 North Point Houston District Offices
Houston, TX 77060

RE: *A# 76-828-558*
John Henry Adeyayo Ayan Badejo
Brief in Support of 1-130 Appeal

Dear Sir or Madam

Please find enclosed the Appellant's brief in support of the I-130 Alien Relative Petition's. She filed on behalf of her husband John Henry Adeyayo Ayan Badejo.

See enclosed copy of Notice of Appeal.

Also, please find enclosed a copy for the Trial Attorney Division of the Houston District Office.

Very truly yours,

Elaine F. Pappas

4151 Southwest Freeway • Suite 380 • Houston, Texas 77027
Phone:713-960-0099 • Fax 713-960-9496 • E-mail: prappas@aol.com

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
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- Attach this card to the back of the mailpiece, or on the front if space permits.

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BCTS
Trial Attorneys
126 Northpoint
Houston, Tx. 77060

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X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

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☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number
(Transfer from service label) 7002 2030 0003 8830 7755

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

ATTORNEYS AT LAW

Prappas

& ASSOCIATES

April 13,2005

Pauline Appelbaum
126 North Point
Houston TX77060

RE: A #76 828 558
John Henry Adeyayo Ayan Badejo
Brief in Support of I-130 Appeal

Dear Madam,

Please be informed the A # printed on the Respondents brief is incorrect.

The correct A # of John Henry Ayenbadejo is A # 76 828 558 and not A # 76 825 558 as it appears in several places on the brief.

Please correct these type graphical errors on the brief before it is submitted to the BIA.

Thank you in advance for your kind cooperation in this matter.

Very truly yours,

Elaine F. Prappas

EFP/rp

6200 Gulf Freeway* Suite 400 * Houston, Texas 77023 * Phone: 713-960-0099*
Fax 713-960-9496 ♦ E-mail: prappas@aol.com

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS OF DECISION OF DISTRICT DIRECTOR

In the Matter:	Fee Stamp
John Henry Adedayo Ayanbadejo	4658 001 11/05/02 9:56 EDIR CT 29 110.00

File Number: A 76 – 828 – 558

5. I hereby appeal to the Board of Immigration Appeals from the decision of the District Director, Houston, TX District, date October 9, 2002, in the above entitled case.

6. Specify reasons for this appeal and continue on separate sheets if necessary. If the factual or legal basis for the appeal is not sufficiently described the appeal may be summarily dismissed. 1. The District Director erred in-not considering all the evidence presented to them, in their determination that the marriage was a "sham". 2. Continued on the next page>>>>>>>>>>>>>>>>>>

7. I ☐ do ☑ do not desire oral argument before the Board of Immigration Appeals in Falls Church, Virgina.

8. I ☑ am ☐ am not filing a separate written brief or statement.

Signature of Appellant
(or attorney or representative)

Elaine F. Prappas
(print or type name)

10/30/2002
Date

Prappas & Associates
4151 Southwest Freeway, Ste. 380
Houston, TX 77027
Address *(number, street, city, state, Zip Code)*

2. District Director erred in his findings that the Petitioner and Beneficiary failed to establish a bonafide marital relationship.
3. District Director abused his discretion and acted in an arbitrary and capricious manner
4. District Director erred in not considering all of the evidence submitted to establish co-habitation, which supports the validity of a bonafide marriage.
5. Petitioner reserves the right to expand and submit additional issues at the time of filing of Petitioner's brief.

INSTRUCTIONS

1. **Filing**. This notice of appeal must be filed with the Office of the Immigration and Naturalization Service (INS) having administrative control over the Record of Proceeding within 15 calendar days *(or 18 calendar days if mailed)* after service of the decision of the District Director. The Notice of Appeal is not to be forwarded directly to the Board of Immigration Appeals (BIA).

2. **Fees**. A fee of one hundred and ten dollars *($110)* must be paid for filing this appeal. It cannot be refunded regardless of the action taken on the appeal. *(Only a single fee need be paid if two or more persons are covered by a single decision.)* DO NOT MAIL CASH. ALL FEES MUST BE SUBMITTED IN THE EXACT AMOUNT. Payment by check or money order must be drawn on a bank or other institution located in the United States and be payable in United States *Currency*. If appellant resides in Guam, check or money order must be payable to the "Treasurer of Guam." If appellant resides in the Virgin Islands, checks or money order must be payable to the "Commissioner of Finance of the Virgin Islands." All other appellants must make the check or money order payable to the "Treasurer of the United States." When check is drawn on account of a person other than the appellant, the name and "A" number of the appellant must be entered on the face of the check. If appeal is submitted from outside the United States, remittance may be made by bank internationa! money order or foregoing draft drawn on a financial institution in the United States and payable to the "Treasurer of the United States" in United States currency. Personal checks are accepted subject to collectibility. An uncollected check will render the appeal form and any document issued pursuant thereto invalid.

3. **Counsel.** In presenting and prosecuting this appeal, the INS may be represented by appropriate counsel. An appellant, other than the INS, may be represented at no expense to the Government by counsel or other duly authorized representative. Pursuant to 8 C.F.R. 3.36(d), a separate notice of appearance must be filed with this notice of appeal.

4. **Briefs.** When a brief is filed, it shall be submitted to the Office of Immigration and Naturalization Service having administrative control over the Record of Proceeding in this matter within the time designated by the District Director. Pursuant to 8 C.F.R. 3.30(a), a copy shall be served on the opposing party. The District Director, or the BIA, for good cause, may extend the time of filing a brief or reply brief. The BIA in its discretion may authorize the filing of briefs with it, in which event the opposing party shall be allowed a specified time to respond.

5. **Oral argument**. No personal appearance by the appellant or counsel is required. The BIA will consider every case on the record submitted, whether or not oral representations are made. Oral argument may be requested. If approved, oral argument in any case should not extend beyond fifteen *(15)* minutes, unless additional time is granted by the BIA pursuant to a request made in advance of the hearing. No interpreters are furnished by the Government for the argument before the BIA.

   An appellant will not be released from detention or permitted to enter the United States to present oral argument to the BIA personally. The appellant, however, may make arrangements to have someone represent him/her before the BIA. Unless such arrangements are made at the time the appeal is taken, the Board will not calendar the case for argument.

6. **Summary dismissal of appeals.** The BIA may deny oral argument and summarily dismiss any appeal in which (i) the party concerned fails to specify' the reasons for his/her appeal on the reverse side of this form, (ii) the only reason specified by the party concerned for his/her appeal involves a finding of fact or conclusion of law which was conceded by him/her at the hearing, (iii) the appeal is from an order that grants the party concerned the relief which he/she requested, or (iv) if the BIA is satisfied from a review of the record, that the appeal is frivolous or filed solely for the purpose of delay.

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE BEFORE THE BOARD OF IMMIGRATION APPEALS EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

TYPE OF PROCEEDING
Deportation | Rescission | Exclusion | Removal | Asylum Only | Motion to Reopen/Reconsider | ✓ Bond

DATE: 10/30/2002

ALIEN NUMBER(S) (Give A-file number and all family members' numbers if applicable)

I hereby enter my appearance as attorney or representative for, and at the request of, the following named person(s):

NAME (First)	(Middle Initial)	(Last)	76-823-358 Jake Hendry Acedavo Ayanbadejo
Felicia	Makeeva		

ADDRESS (Number & Street)	(Apt. No.)	(City)	(State)	(Zip Code)
[redacted] Harwin #322		Houston	TX	77036

Please check one of the following:

✓ 1. I am a member in good standing of the bar of the highest court(s) of the following State(s), possession(s), territory(s), Commonwealth(s) or the District of Columbia:

Name(s) of Court(s)	State Bar No. (if applicable)
Supreme Court	16229050

(Check the space on reverse side to list additional jurisdictions.)

I am not the subject of any sanction(s) or order(s) affecting my eligibility to practice before any court, agency, or service, including any order suspending, enjoining, restraining, disbarring, or otherwise restricting me in the practice of law and the order(s) listed above comprise all of the jurisdictions under which I am licensed to practice law.

2. I am an accredited representative of the following qualified non-profit religious, charitable, social service, or similar organization established in the United States, as recognized by the Executive Office for Immigration Review (provide name of organization): _____

3. I am a law student or law graduate reputable individual, accredited official, or other person authorized to represent under 8 C.F.R. § 292. (Explain fully on reverse side.)

I have read and understand the explanations provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representation before the Board of Immigration Appeals. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE	BAR NO.	TELEPHONE NUMBER (Include Area Code)	DATE
	16229050	713-960-0099	10/30/2002

NAME OF ATTORNEY OR REPRESENTATIVE (TYPE OR PRINT)	ADDRESS — Check here if this is a new address
Elaine F. Peppas	Peppas & Associates, 4151 Southwest Freeway, Ste. 380 Houston, TX 77027

Certificate of Service

I, Elaine F. Peppas (Name), mailed or delivered a copy of the foregoing on 10/30/2002 (Date) to the following party and to the following address: 126 North Post, Houston, TX 77007 (Address).

(Signature of Attorney or Representative)

(Revised 11/15/2001) FORM EOIR-27 August 99

(Note: Also may be required to sign Acknowledgement and Consent on reverse side of this form.)

Ayanbadejo-000017

BEST AVAILABLE COPY

I HEREBY ACKNOWLEDGE THAT THE ABOVE-NAMED ATTORNEY OR REPRESENTATIVE REPRESENTS ME IN THESE PROCEEDINGS AND I CONSENT TO THE DISCLOSURE TO HIM/HER OF ANY RECORDS PERTAINING TO ME WHICH APPEAR IN ANY EOIR SYSTEM OF RECORDS.

NAME OF PERSON CONSENTING	SIGNATURE OF PERSON CONSENTING	DATE
Felicia Maltezos		10/30/2002

(NOTE: *The Privacy Act of 1974 requires that if person giving representation is or does not be a citizen of the United States or an alien lawfully admitted for permanent residence, he/she must sign this form.*)

APPEARANCES - An appearance shall be filed on **EOIR Form 27** by the attorney or representative appearing in each appeal before the Board of Immigration Appeals (see 8 C.F.R. § 3.3(a)(3)). even though the attorney or representative may have appeared in the case before the Immigration Judge or the Immigration and Naturalization Service. When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature shall constitute a representation that, under the provisions of 8 C.F.R. Chapter 1, he/she is authorized and qualified to represent individuals. Thereafter, substitution or withdrawal may be permitted upon the approval of the Board of a request by the attorney or representative of record in accordance with *Matter of Rigdon*, 19 I&N Dec. 465(1953). Further proof of authority to act in a representative capacity may be required.

REPRESENTATION - A person entitled representation may be represented by any of the following:

(1) Attorneys in the United States as defined in 8 C.F.R. § 1.1(f).

(2) Law students and law graduates not yet admitted to the bar as defined in 8 C.F.R. § 292.1(a)(2).

(3) Reputable individuals as defined in 8 C.F.R. § 292.1(a)(3).

(4) Accredited representatives as defined in 8 C.F.R. § 292.1(a)(4).

(5) Accredited officials as defined in 8 C.F.R. § 292.1(a)(5).

THIS FORM MAY NOT BE USED TO REQUEST RECORDS UNDER THE FREEDOM OF INFORMATION ACT OR THE PRIVACY ACT. THE MANNER OF REQUESTING SUCH RECORDS IS CONTAINED IN 28 C.F.R. §§ 16.1-16.11 AND APPENDICES.

Public reporting burden for the collection of information is estimated to average 6 minutes per response, including the time for reviewing the data needed, completing and reviewing the collection of information, and record-keeping. Send comments regarding the burden estimate or any other aspect of this information collection including suggestions for reducing this burden to the Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041.

(Please attach additional sheets of paper as necessary.)

(Rev. 06/05/2002)

Attorney Retainer

Ayanbadejo-000018

ATTORNEYS AT LAW

Prappas

& Associates

November 1, 2002

United States Department of Justice
Immigration and Naturalization Service
126 Northpoint
Houston, TX 77060

Express Mail EV201712918US

Re: Notice of Appeal to the BIA
John Henry Adedayo Ayanbadejo
A#76-825-558

Dear Sir or Madam:

Please find enclosed Notice to the BIA (EOIR -29) for the above-mentioned individual.
I have enclosed a check in the amount of $110.00 for statuory filing fees, and a self-address-stamped-envelope so that the receipt can be returned.
As per instructions and I have enclosed a copy for the District Director and also for compliance for the Certificate of Service of the (EOIR-27)
If there are any questions regarding this mater, please do not hesitate to contact my office. Thank you in advance for your time and attention.

Very truly yours,

Elaine F. Prappas

EFP/nwd

Ayanbadejo-000019

4151 Southwest Freeway. Suite 380 Houston, Texas 77027 Phone: 713-960-0099 Fax: 713-960-9496 E-mail:prappas@aol.com

WAOBIKEZE & ASSOCIATES

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

TEL: 713.771.1331 10101 Harwin Drive, Suite 322 www.wapclawyers.com
FAX: 713.771.1471 Houston, Texas 77036-1688 attys@wapclawyers.com

July 23, 2002

VIA US MAIL, CERTIFIED
RETURN RECEIPT REQUESTED
Immigration & Naturalization Service
Attn: Examinations Section
126 Northpoint Drive
Houston, Texas 77060

RE: RESPONSE TO NOTICE OF INTENT TO DENY
JOHN-HENRY AYANBADEJO
A76 828 558

Dear Sir or Madam:

This is in response to your Notice of Intent to Deny letter dated June 26, 2002. Enclosed you will find the following in response therewith:

1 Ms. Ayanbadejo's sworn affidavit on her husband's behalf;
2 Documents relating to why Mr. Ayanbadejo temporarily relocated to New York;
3 Tax returns and other IRS related documents for the couple; and
4. Miscellaneous photographs and letters written by the couple to each other.

Please note that contrary to your assertion in your letter and according to the enclosed documents, the marriage between Mr. and Ms. Ayanbadejo was based on their love for one another and their desire to spend the remainder of their natural lives together as husband and wife.

Kindly continue processing Mr. Ayanbadejo's application in your usual and customary manner and forward all correspondence regarding same to our office.

If you have further questions, comments, or concerns, please do not hesitate to contact me and/or our Legal Assistant, Grace Ekeke at 713.771.1331.

Sincerely,

WAOBIKEZE ASSOCIATES, P.C.

Ike N. A. Waobikeze, Esq.

INAW/ge

Enclosures

Cc: Client

AFFIDAVIT OF FELICIA D. AYANBADEJO IN SUPPORT OF A APPLICATION FOR ADJUSTMENT OF STATUS FILED ON BEHALF OF MY HUSBAND JOHN-HENRY AYANBADEJO

STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

BEFORE ME, THE UNDERSIGNED AUTHORITY, personally appeared this 17th day of July 2002, FELICIA D, AYANBADEJO, a person known to me and, having-been duly sworn by me, stated under oath the following:

"My name is Felicia- D. Ayanbadejo and the purpose of this Affidavit is to respond to the Immigration & Naturalization Service (INS) Notice of Intent to Deny a Visa Petition that I filed on behalf of my husband JOHN-HENRY AYANBADEJO. I will begin with why we filed a second application.

1. In or about February 2001, my husband John-Henry made several inquiries on the status of his initial application for adjustment of status and despite the several inquiries made to the INS no response was forthcoming from the INS. On consultation with another Attorney we decided we could file another petition that will result in faster processing of the application, so that better job opportunities would be open to my husband.
2. In the initial stages of my marriage to my husband John-Henry, we had discussed our future plans and he had informed me that since he had a foreign law degree he would inquire whether he could sit for the Texas Bar exam so that he could practice as an attorney here in Texas. *As* 1 understand it my husband called the Texas Bar and" he was informed that he was not eligible to take the Texas Bar because he did not have up to five years of practice as an attorney in his home country or three years of practice as an attorney here in the United States.
3. In or about February of 1998, my husband insisted that he still desired to practice as an attorney here in Texas and had made inquiries to other states about the possibility of .sitting for their Bar examination,

New York and California gave a positive response arid he proceeded to try both state's exam. In *or* about June of 2000 he was sworn in as an attorney in New York State and shortly thereafter we had agreed that he could practice there for a while and later sit for the Texas Bar Exam. During the time he was in New York we had exchanged correspondence and he visited me *in* Texas whenever his finances and his job permitted because he had assisted me in the purchase of my new car by agreeing to the withdrawals from our joint bank account for emergencies and had also given me some money and gifts when he visited. Whenever he visited and arrived late in Texas he stayed overnight at his brother's place in Houston and proceeded to our home in Beaumont, Texas the next day. He had requested I visit him in New York and I had promised him that I would visit once I had overcome my fear of flying and fear of New York City with its high crime rate, but the events of September 11, 2001 was discouraging to me. Attached are evidence of the correspondence between my husband and I. Also attached are evidence of gifts he has purchased for me in the past, together with pictures I took of my husband at my previous apartment at 5550 Folsom Dr., Apt 112, Beaumont, Texas 77706.

4. We have always been supportive of each other both financially and emotionally and at present we had agreed that I pay on taxes my husband owes the IRS. We had owed the IRS in the past and my husband settled the matter with the IRS, Attached are copies of documents we presented to the IRS in settling matters with the agency and copies of cheeks issued to settle bills with the IRS. Also attached is a copy of a picture of me sent to my husband for him to insert in his wallet.
5. Our marriage was not entered into for immigration purposes, but was entered into because of the love and respect we had for each other. Although it has not always

been a bed of roses, we have managed to make it work for five years, longer than most marriages, despite the trials and tribulations. We are a young couple striving to achieve the American dream like others.

6. I do not now or ever wish to withdraw the visa petitions that I fried on behalf of my husband John-Henry Ayanbadejo on March 3, 1997 and on April 17, 2000.

I have read the foregoing affidavit and I do hereby declare that all statements contained herein are true and correct to the best of my knowledge and belief.

FELICIA D. AYANBADEJO

SWORN AND SUBSCRIBED TO under my hand and seal this 18 day of July 2002.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

MARRIAGE LICENSE

The State of Texas, County of Harris

Greeting

You are hereby authorized to conduct the Rites of Matrimony Between

[illegible] and

[illegible]

And make due return to the County Clerk of Harris County, Texas within ninety days after the date of this License.

Witness my Official Signature and Seal of Office in Harris County, Texas

[illegible] on [illegible]

County Clerk, Harris County, Texas

By [illegible] Deputy

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

VERIFICATION OF JOHN AYANBADEJO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATE OF TEXAS §
§
COUNTY OF HARRIS §

John Ayanbadejo, Petitioner in the above Appeal personally appeared before me, the Notary Public whose signature is on this Verification, on October 26, 2010. After being duly sworn, he stated, under oath, that he has read Petitioners' Application for Writ of Certiorari with accompanying Exhibits and that as Petitioner he has personal knowledge as to every item stated in it and that the statements made in the said Writ are true and correct to the best of my knowledge. The Writ is made in good faith and having reviewed the lower Court's record, I express a belief, based on a reasoned and studied judgment that the performance of my former lead counsel, Mr. Colon, fell below minimal standards of professional competence and has severely prejudiced Petitioners.

John Ayanbadejo

SUBSCRIBED AND SWORN TO BEFORE ME on October 26, 2010 at Houston, Texas, as attested to by my seal and signature as set out below.

Signature Susan Sharon Spiegel

Name Susan Sharon Spiegel

Notary Public in and for the State of Texas

My Commission expires:

Date Nov 15, 2010

FILED
JAN 29 2011
OFFICE OF THE CLERK

NO. 10-583

IN THE
SUPREME COURT OF THE UNITED STATES

FELICIA MALVEAUX,
JOHN AYANBADEJO, - *PETITIONERS,*

vs.

JANET NAPOLITANO,
SECRETARY DEPT. OF HOMELAND SECURITY ET AL.; - *RESPONDENTS.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Respectfully Submitted,
John Ayanbadejo,
Pro se
11152 Westheimer Road, Unit 532
Houston, Texas 77042
Email: johnhenryesq@yahoo.com
TEL: (713) 385-6244

PETITION FOR REHEARING

ISSUE

Whether the courts below erred in relying on *Keith Bowles v. Harry Russell, Warden*, Supreme Court, 551 U.S, 204; 127 S. Ct. 2369 L. Ed 2d96; 2007 and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) as controlling authority that a filing period is jurisdictional under the circumstances of this case.

LIST OF PARTIES IN COURT BELOW

1. Felicia Malveaux Ayanbadejo and John Ayanbadejo, Plaintiffs-Petitioners, *Pro se.*
2. Janet Napolitano, Secretary, Department of Homeland Security, Defendant-Appellees.
3. Sharon A. Hudson, District Director, United States Citizenship and Immigration Services, Defendant-Appellee.
4. United States Citizenship and Immigration Services, Defendant-Appellee.
5. Samuel G. Langoria

   Assistant United States Attorney

   P. O. Box 61129

   Houston, Texas 77010

   Tel.: (713) 567-9514

   Fax: (713) 718-3307

   ATTORNEYS FOR DEFENDANTS-RESPONDENTS

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Appellants present their petition for rehearing of the above-entitled cause, and, in support of it respectfully show:

GROUNDS FOR REHEARING

A rehearing of the decision in the matter is in the interest of justice because:

1. On January 10, 2011, this court summarily denied the petition for writ of certiorari.

2. The Court gave no grounds for its ruling, which came as a surprise to petitioner.

3. Petitioner was not granted an opportunity to distinguish this case from *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) case or to suggest why they should not be determined by the same rule.

4. This case contains several crucial factual and procedural distinctions from the case of *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) that warrant its determination by a different or at least altered rule.

a. In *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985), the petitioners received a copy of the Court's decision and were mistaken as to the time to file a Notice of Appeal. In instant case there was probative evidence that petitioner John Ayanbadejo never received a copy of the Court's decision within the time limits due to the ineffectiveness of counsel. Mr. Ayanbadejo diligently hired multiple counsel and regularly inquired about the status of the case from one of the attorneys he hired. *See* Appendix "H" and "I" of Petitioners' Appendix filed before this Court.

b. In *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) the attorney-in-charge of the petitioners, where there was one, did not withdraw from the case while the case was pending, without informing the petitioner or filing a formal notice to withdraw notifying petitioner. In instant case attorney-in-charge of petitioners withdrew from the case ***while the case was pending*** without informing petitioner John Ayanbadejo nor did the attorney-in-charge file a formal notice to withdraw notifying petitioner John Ayanbadejo. Mr. Ayanbadejo was induced into believing he had competent attorney-in-charge representing petitioners' interests when the contrary was the case.

It is noteworthy that attorney-in-charge continued to receive notifications from the Court without forwarding the same to Petitioner John Ayanbadejo, even though the attorney-in-charge had Petitioner John Ayanbadejo's full contact information. Petitioner John Ayanbadejo promptly filed Notice of Appeal within 7 days of receipt of Notice of the District Court's decision and the respondents were not prejudiced by the filing.

c. But for the ineffectiveness of counsel, petitioner would have been able to present evidence that would have fundamentally altered the course of the case in lower Court and to timely file his Notice of Appeal. *See* Affidavits recently submitted to respondents reprinted in Appendix "N" and "O" of Petitioners' Supplemental Appendix.

5. The lower courts erred on following the jurisdiction rule promulgated by *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985). After the entry of

final judgment a party has 30 days to file a notice of appeal. Fed. R, App. P. 4(a)(1)(A); 28 U.S.C.S. § 2107(a). 28 U.S.C.S. § 2107(c) and Fed. R. App. P. 4(a)(6) allows district courts in some circumstances to extend upon request the filing period by 14 days or within 7 days after receipt of notice. In *Bowles*, the judge told defendant that he had 17 days to file notice of appeal. Defendant acted on that and filed on the 17th day. The movant can file an appeal with 180 days or 7 days after receipt of the notice of the entry of judgment, and no party would be prejudiced. The rulings of *Bowles* and *Robbins* are that the taking of an appeal within the prescribed time is mandatory and jurisdictional. This can be construed as that certain procedural time lines are mandatory and therefore are jurisdictional. The foregoing is contrary to the law on jurisdiction and tolling in the newer cases, *infra*.

Robbins respectfully, is out of date, out of touch, and does not state the law as it is now held in the 5th Circuit according to the controlling cases, *infra*.

Reed Elsevier, Inc. Et Al, Petitioners v. Irvin Muchinick, Et Al., 120 S.Ct. 1237; 176 L. Ed. 18; 2310 U.S. Stated re *Bowles*:

> *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* (*1278) stands for the proposition that context, including this Court's interpretation of similar provisions in

many years is relevant to whether a statute ranks a requirement as jurisdictional. (p.8)

To the same effect is *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516, 126 S.Ct. 1235, 183 L. Ed. 2d 1097.

In *Padilla v. Kentucky*, No. 08–651, __ U.S. __ (Mar. 31, 2010), this Court recognizing the need for competent counsel, reversed and remanded, holding that criminal defense counsel must inform noncitizen clients whether the plea carries a risk of deportation.

Timothy J. Engel v. 34 East Putnam Ave. Corp., 552 F. supp. 2d 281 (U.S Dist. Ct.U.-2008) held, where a party filed a motion to remand under 28 U.S.C § 2441 (b) filed a motion to remand "notwithstanding *Bowles* (citation omitted) recognizing that *Scarborough* involved a statutory time limit that was not jurisdictional). Statutes of limitations, for example, are generally regarded as defenses and are not jurisdictional. (p. 292). The remand was allowed.

Diaz v. Walter Kelly, Superintendent of Attica Correctional, et al, 515 F3rd 149 (CA 2-N.Y.) at p. 149-150, held that defendant Tan who had language difficulties and there was probative evidence that he had not received a copy of the court's order, and that when he received it he filed it the next day the AEDPA limitation on filing was tolled. The court noted. "it would be an unwarranted extension of *Bowles* to think that the Court was impliedly rendering equitable tolling inequitable to limitations periods just because they are set forth in statutes."

The Fifth Circuit in *The United States Of America, And The State Of Texas v. Halliburton*

Energy Services, Inc., Et Al., 2009 U.S. Dist., Lexis,*24; ELR 2040 2009 U.S... Dist. Court:

Further, the Fifth Circuit has rejected arguments that all statutory time limits are jurisdictional requirements. In *U.S. v. Petty*, the Fifth Circuit stated *Bowles* as limited to "jurisdictional requirements" and thus held that the Antiterrorism and Effective Death Penalty Acts ("AEDPA") one-year limitation period was subject to extension by equitable tolling, 330 F.3d 361, 364& n 5, (5th Cir. 2008). *See Boothe v. Quarterman*, 2008, U.S. Dist. Lexis 31498, 2008 WL 1771919, at *15-*16. (S.D Tex. Apr. 15, 2008) (analyzing *Bowles* and *John R. Sand & Gravel* and noting that most statutes of limitations are non-jurisdictional). Other circuits agree that *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) did not transform every statutory time limit into a jurisdictional requirement. *See Waldron Ramsey v. Pachalke*, 556 F. 3rd 1008, 1011n2 (9th Cir. 2009); *Diaz v. Kelly*, 515 3rd 149, 153-54 (2nd Cir. 2008) both holding that a deadline for motions to dismiss for presumed abuse in the bankruptcy context was subject to waiver because it was not a jurisdictional requirement."

Because the Fifth Circuit Court of Appeals dismissed Appellants' appeal based on *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) the court is in error and this Petition for Rehearing ought to be accepted and considered.

6. A rehearing tightly and squarely focused on the distinctions between this case and *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) case, and whether these distinctions merit a different rule of

law, is a matter of fundamental fairness to petitioner and would not unduly burden the Court. Respectfully, it is a fact of life that a party requires the need for competent counsel; Supreme Court Justices, members of the executive, members of congress, and USCIS agents are not immune from this need as can be gleaned from current affairs. Protecting the need for competent counsel is a matter of fundamental fairness.

CONCLUSION

For the foregoing reasons, John Ayanbadejo urges that this petition for a rehearing be granted, and that, on further consideration the Petition for Certiorari be granted and/or the judgment of the lower court be reversed.

Dated: January 29, 2011

Respectfully Submitted,
John Ayanbadejo
11152 Westheimer Road, # 532
Houston, Texas 77042
Email: johnhenryesq@yahoo.com
TEL: (713) 385-6244

By: _____
John Ayanbadejo

PRO SE

CERTIFICATE OF GOOD FAITH

I, John Ayanbadejo, *Pro Se* Petitioner, certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44 of the Rules of this Court.

By: _____
John Ayanbadejo

PRO SE

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

As required by Supreme Court Rule 33.1(h), I certify that the document contains approximately 1435 or less than 3000 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 29, 2011

By: _____
John Ayanbadejo

PRO SE

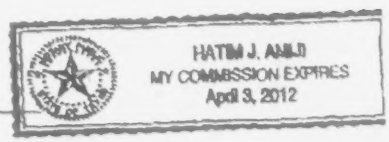
SUBSCRIBED AND SWORN TO BEFORE ME on January 29, 2011 at Houston, Texas, as attested to by my seal and signature as set out below.

Signature _____

Name Hatim J. Amiji

Notary Public in and for the State of Texas

My Commission expires:
Date 04-03-2012



Supreme Court, U S
FILED
JAN 29 2011
OFFICE OF THE CLERK

NO. 10-583

IN THE
SUPREME COURT OF THE UNITED STATES

FELICIA MALVEAUX,
JOHN AYANBADEJO, - *PETITIONERS,*

vs.

JANET NAPOLITANO,
SECRETARY DEPT. OF HOMELAND SECURITY ET AL.; - *RESPONDENTS.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING SUPPLEMENTAL APPENDIX

Respectfully Submitted,
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APPENDIX O: AFFIDAVIT OF HAKEEM ADEYEMI

AFFIDAVIT OF DIMETRI MALVEAUX ADEYEMI

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Dimetri Malveaux Adeyemi, being duly sworn, deposes and says:

1 I am a United States Citizen married to a United States Citizen spouse, originally of Nigerian Nationality, Mr. Hakeem Adeyemi, we have been married for several years and am older sister to Felicia Malveaux.

2. I live at 12046 Natural Bridges Lane, Sugarland, Texas 77498

3. I know Mr. John Ayanbadejo since sometime in December 1996.

4. Prior to knowing Mr. John Ayanbadejo, I have known Mr Ayanbadejo's family and siblings, Mr. Patrick Ayanbadejo, Mr. Christopher Ayanbadejo, and Ms. Moji Ayanbadejo.

5. Sometime in December 1996, I had a small family gathering and Mr. John Ayanbadejo and his sibling visited my residence during that time.

6. Mr. Ayanbadejo explained that he was visiting for his sister's Graduation from Texas A & M University in College Station, Texas.

7 I introduced Mr. John Ayanbadejo to members of my family including my children, my mother, and Felicia Malveaux, my younger sister who is a friend to Mr. John Ayanbadejo's sister

8 During the course of the visit, I noticed that Mr John Ayanbadejo and Felicia, my sister, liked each other from the way they spoke to each other.

9. Shortly after the visit Felicia and John Ayanbadejo saw each other on a more frequent basis.

10. On or about February 10, 1997, Felicia Malveaux and John Ayanbadejo quietly got married in Houston, Harris County, Texas.

11. Subsequently after their marriage Felicia Malveaux and John Ayanbadejo were frequent visitors to Hakeem's and my residence.

12. The visits became infrequent sometime in September 2000 when Felicia Malveaux explained to my husband and I that Mr. John Ayanbadejo had to temporarily go to New York to get some American legal experience on his resume because he could not find legal work here in Texas despite sending his resume to numerous legal employers

13. I verily believe that Felicia and John Ayanbadejo were married in good faith.

14. I very believe that Mr John Ayanbadejo is a person of very good moral character

I signed this Affidavit on _____, 2010 at Houston, Texas.

_____

Dimetri Malveaux Adeyemi

SUBSCRIBED AND SWORN TO BEFORE ME on July 5, 2010 at _____, Texas, as attested to by my seal and signature as set out below.

Signature _____

Name Juan Guerren

Notary Public in and for the State of Texas

My Commission expires:

Date 9-24-10

AFFIDAVIT OF HAKEEM ADEYEMI

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Hakeem Adeyemi, being duly sworn, deposes and says:

1. I am a United States Citizen, originally a Nigerian National, married to a United States Citizen spouse,, Mrs. Dimetri Malveaux Adeyemi, older sister to Felicia Malveaux and we have been married for several years.

2. I live at 12046 Natural Bridges Lane, Sugarland, Texas 77498.

3. I know Mr. John Ayanbadejo since sometime in December 1996.

4. Prior to knowing Mr. John Ayanbadejo, I have known Mr. Ayanbadejo's family and siblings, Mr. Patrick Ayanbadejo, Mr. Christopher Ayanbadejo, and Ms, Moji Ayanbadejo

5. Sometime in December 1996, I had a smalll family gathering and Mr. John Ayanbadejo and his sibling visited my residence during that time.

15. Mr. Ayanbadejo explained that he was visiting for his sister's Graduation from Texas A & M University in College Station, Texas.

16 I introduced Mr. John Ayanbadejo to members of my family including my wife, children, my mother, and Felicia Malveaux, my wife's younger sister who is a friend to Mr John Ayanbadejo's sister.

17 During the course of the visit, I noticed that Mr. John Ayanbadejo and Felicia liked each other from the way they spoke to each other.

18. Shortly after the visit Felicia and John Ayanbadejo saw each other on a more frequent basis.

19 On or about February 10, 1997, Felicia Malveaux and John Ayanbadejo quietly got married in Houston, Harris County, Texas.

20. Subsequently after their marriage Felicia Malveaux and John Ayanbadejo were frequent visitors to Dimetri's and my residence.

21. The visits became infrequent sometime in September 2000 when Felicia Malveaux explained to my wife and I that Mr. Ayanbadejo had to temporarily go to New York to get some American legal experience on his resume because he could not find legal

work here in Texas despite sending his resume to numerous legal employers.

22. I verily believe that Felicia and John Ayanbadejo were married in good faith.

23. I very believe that Mr. John Ayanbadejo is a person of very good moral character.

I signed this Affidavit on 10/1/10, 2010 at Houston, Texas.

Hakeem Adeyemi

SUBSCRIBED AND SWORN TO BEFORE ME on September 24, 2010 at _____, Texas, as attested to by my seal and signature as set out below.

Signature _____

Name Mana D. Santamana
Notary Public in and for the State of Texas

My Commission expires:

Date 08-07-12